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# MISCHIEFS OF THE MARRIAGE LAW

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# MISCHIEFS OF THE MARRIAGE LAW

AN ESSAY IN REFORM

*by*

J. F. WORSLEY-BODEN

M.A., D.LITT.

UT CONSENSU MATRIMONIUM SOLVI POSSIT

Justin II, *Novella* 140, C. 1

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TO  
MY WIFE  
ROSITA WORSLEY-BODEN  
WHO SHARES MY CONVICTIONS AS A REFORMER  
AND HAS AIDED MY PRESENTATION  
OF THE CASE IN MANY  
PRACTICAL WAYS

Change of Author's name, *v.* London Gazette, February 17th 1933

J. F. W. BODEN-WORSLEY  
*Doctor in Jure Civili; Vice-President of*  
The Marriage Law Reform League

"If mutual affection is the basis of marriage, it is right that when the parties have changed their minds they should be allowed to dissolve it by mutual consent."

JUSTIN II, Second Novel, A.D. 565 (Nov. 140).

". . . the absolute and final hindering of divorce cannot belong to any civil or earthly power against the will and consent of both parties, or of the husband alone. . . ."

MILTON, *The Doctrine and Discipline of Divorce*, Bk. II, Ch. 21

". . . to interpose a jurisdictional power over the inward and irremediable disposition of man, to command love and sympathy, to forbid dislike against the guiltless instinct of nature, is not within the province of any law to reach; and were indeed an uncommodious rudeness, not a just power."

*Ibid.*

"So that which way soever we look, the law can to no rational purpose forbid divorce; it can only take care that the conditions of divorce be not injurious."

*Ibid.*

". . . Divorce is not a disease, but a remedy for a disease . . . the law should be such as would give relief where serious causes intervene, which generally and properly are recognized as leading to the break-up of married life."

LORD GORELL, Chairman of the Royal Commission,  
Majority Report, p. 95.

". . . Permanent separation without divorce has a distinct tendency to encourage immorality, and is an unsatisfactory remedy to apply to the evils it is supposed to prevent."

GORELL BARNES, P., *Dodd v. Dodd*, [1906] P. 189.

"Ecclesiastical law has a habit of being sterner, harsher and more unbending than the common law, perhaps because its makers did not live in the world and did not realize all that such rules mean to frailer humanity."

LORD BIRKENHEAD, *Last Essays*, p. 430.

". . . while almost all definitions are difficult, there is no definition which it exceeds the resource and the ingenuity of the law to make."

LORD BIRKENHEAD, L.C., Debate on Matrimonial Causes Bill,  
House of Lords, 1920; Hansard (Lords), Vol. 39, p. 675.

## PREFACE

The following pages are concerned chiefly with the Law; but, for reasons which appear in the Introduction, the argument must

### ERRATA

(*Mischiefs of the Marriage Law*)

- p. 94, l.26 — *By conformity understand* not local amendment of the Canon Law, which was universal; but the failure of the Canon Law at some points to prevail over the Common Law.
- p. 109, l.37 & p. 113, l.19 — *For* decrees *read* degrees.
- p. 113, l.23 — *For* 1554 *read* 1553 and 1554; and for f.n. 5 (same page) *read* By 1 Mary Sess. 2, c.1 and 1 & 2 Phil. & Mary, c.8.
- p. 214, l.15 — *For* House of Lords *read* Court of Appeal.
- p. 253, f.n. & p. 343, l.25 — *For* Chapter III *read* Chapter I.
- p. 260, f.n. & p. 325, f.n. — *For* 20 & 21 *read* 21 & 22.
- p. 274, l.14 — *For* Debtors Act, 1869, s.5 *read* principal Act (58 & 59 Vict. c.39) s.9; and (l.15) *for* six weeks *read* three months.
- p. 279, l.19 — *For* respondent *read* un-named.
- p. 307, l.31 & p. 308, l.22 — *For* self-governing dominions *read* British Possessions other than self-governing dominions; and for f.n. 2 *read* Now extended to Kenya and Jamaica.
- p. 415, l.31 — *For* at least *read* at least until; and *for* exogomy *read* exogamy.

trivial grounds would commonly be deflected by consideration of time and trouble.

Although this book must necessarily cover much old ground, it can claim to be a new survey, setting history, law, religion, and sexological considerations in an association such as to show that the reform of the Law, which is the main theme, has large and wide support on intellectual and social grounds. In the process of demonstrating the presence and influence of the Canon Law in principle and practice, it claims to make a contribution to the science of the law itself. For, apart from the reference of common defects to that abiding influence, it investigates the particular example of the Discretion, lately brought into unwonted prominence in the case of *Apted v. Apted & Bliss*, [1930] P. 246. Here I question the practice of the Court ever since the Matrimonial Causes Act of 1857 provided for the exercise of the discretion (s. 31), and Lord Penzance set the precedent of what I am led to regard as misinterpretation in the case of *Morgan v. Morgan & Porter* (1869), L.R. 1 P & D. 644. The distinction in interpretation appears to be far reaching in effect, and the suggestion which I make in the book seems to be new; at any rate I have not been able to discover any suggestion, save in one brief letter which appeared over initials in *The Times* in 1930 that the interpretation which has consistently governed the Court is not unimpeachable.

It is impossible to discuss the law of divorce without ecclesiastical reference, more or less direct; and the vexed question of re-marriage after divorce, where the provisions of the Statute are commonly repudiated by the Church, illustrates to-day a recrudescence of the principle, and a new phase in practice, of the Canon Law opposition to the more liberal and humane legislation of the State. *Per contra*, the venerable doctrine of nullity, which (excepting perhaps the very remote case of the incapacity of *castrati* in the Roman Civil Law) is of ecclesiastical origin, has tended to suffer less respect in the State Courts than ecclesiastical precedent would seem to expect. Following the decision in *Salvesen v. Administrator of Austrian Property*, [1927] A.C. 641, the Court dismissed the petition in the case of *Inverclyde (otherwise Tripp) v. Inverclyde*, [1931] P. 29, for lack of jurisdiction on the ground that, in order to hear a petition to annul a voidable marriage, it required the same jurisdiction as

is requisite for a suit for dissolution, which it did not possess. The case was unprecedented on the point that no previous suit on the ground of incapacity had failed to satisfy the test of domicil. This case has caused a considerable discussion in these pages in the interest of the disentanglement of void, voidable and valid marriages, with reference to the possibility of future reform.

A word ought here to be said on a point which is implicit, and I hope clear, in this book, viz., the legal fact of distinction in principle between divorce and nullity. A reviewer in *The Times Literary Supplement*<sup>1</sup> recently wrote of 'the infamous doctrine of nullity'; and it is often suggested that the Canon Law doctrine of nullity, which survives to-day not only in the Roman Church but unavoidably also in the Law of England and all civilized countries, serves as some sort of safety-valve when marriage is indissoluble or when the grounds of divorce are limited. Here it must be maintained that the charge against the survival of Canon Law principles, on the ground of their detriment to divorce suits, does not apply to the indispensable doctrine of nullity. In mediaeval times, when marriage was indissoluble, it is true that the system of impediments and the practice of dispensations could and did provide for the easy repudiation of marriage, on sufficient terms; so that the notion of nullity as a safety-valve has had some justification. But the distinction in principle has always been maintained, although the word 'divorce' was in common but incorrect use as a description of both annulment and separation *a mensa et thoro*. In duty, therefore, both to the Roman Church and to the English Law it must be insisted that annulment of marriage, which is a decree that a marriage is null and void, or a declaration of a state of nullity, is quite distinct from a dissolution; because it applies only to unions which were invalid from the first and in fact never were marriages, whereas a dissolution is, as its name implies, the termination of a valid marriage. The reference in the last paragraph to 'void, voidable and valid marriages' will be comprehensible in the later pages of this book; for it will there be seen that the storm centre of difficulty and contradiction lies in the dual affinity of a voidable marriage, for which, while a decree has the effect of nullity, the more exacting jurisdiction which is required for a dissolution

<sup>1</sup> No. 1532, June 11, 1931, p. 465.



may be needed in order to obtain it. Although the distinction between dissolution and nullity remains as a matter of legal principle and plain fact, it will be seen that a law which is radically reformed in respect of the grounds of dissolution would sometimes enable the dissolution of voidable marriages.

The opposition to reform of the law in Matrimonial Causes seems to be vociferous and strong; but it is mainly confined to ecclesiastical circles, and its volume shows signs of decline. But the demand for reform has grown in strength and is not abating. Since the Royal Commission of twenty years ago proposals for increased facilities for divorce have reached more than once the stage of Parliamentary debate. Such proposals for new grounds, specified and defined, if they were adopted by the Legislature, would bring the Law of England into some measure of conformity with foreign practice, and would indeed carry it in advance of the practice in some of the States of America where the grounds are commonly represented as being much wider than is the case. But I would maintain that these proposals would not meet the radical need for divorce on fundamental grounds. Although much is heard to the discredit of systems where incompatibility and mutual consent are in operation, yet these grounds are the ultimate resort of every reformer who realizes the profundity of the problem. It may be that my proposals, which claim to be new, are in fact in some sense the product of my own study of the Roman Civil Law which was begun more than twenty years ago (when I cherished an ambition to practise in the Divorce Division); for the *repudium* and the *divortium* are plainly reproduced. But it can at least be claimed that the mode of their adaptation to modern English use is new, as also and necessarily the adaptation of present practice, wherever practicable, to grounds which, even if allowance be made for Anglo-Saxon law and custom, have never in their proposed form been known in this country, and which would undermine the long-established Canon Law principle of the antagonistic suit.

It has been my endeavour to give to this legal thesis a setting and presentation which would render it readable beyond the comparatively small but highly specialized circle of academic lawyers and those members of the profession in both branches who practise in the Divorce Division. The public argument

necessitates considerations which lie outside the strict sphere of law, and will explain the presence of historical and sexological chapters which themselves make no claim to original research; and the attempt to commend legal problems to lay intelligence will perhaps be allowed to account for some redundancy in the interests of exegetic emphasis. I hope that the preliminary Tables of Statutes, Cases and Law Reports cited in the book, together with the Appendices which reproduce the Statute Law in respect of relief and the grounds of relief in other countries, may be of assistance to readers; and that the Bibliography may serve as a guide to any who are disposed to pursue the subject more fully.

I owe grateful thanks to the following, whom I mention in the chronological order of their assistance: Mr. Ernest Remnant, sometime Editor of the *English Review*, who before his retirement gave me permission to reprint in whole or in part an article in popular form on 'Discretion,' which I contributed to that Review in 1930; to the Rev. J. S. Bezzant, M.A., Fellow of Exeter College, Oxford, who read the chapter, 'The Contribution of Christianity,' at an early stage and gave me valuable advice; to the Rev. Dr. Geikie-Cobb, Chairman of the Marriage Law Reform League, who has kept me supplied with the literature, which is credited to him in the Bibliography, and has been a valued correspondent on occasional points; to Mr. R. F. Bayford, K.C., Bencher of the Inner Temple, and to Mr. William Latey, M.B.E., of the Middle Temple, the learned Editor of Browne & Latey's *Divorce*, the first of whom enlightened me on the satisfactory working of the new Rule following *Apted v. Apted (supra)*, and the second of whom was at pains to confirm the correctness of my statement of the procedure under that Rule; to Mr. C. J. B. Gaskoin, M.A., of Jesus College and Fitzwilliam House, Cambridge, who read some of the early historical chapters, and greatly assisted me on points of arrangement when the book was in a state of provisional completion; to Dr. Arnold D. McNair, LL.D., Fellow of Gonville and Caius College, Cambridge, and sometime Reader in International Law in the University of London, who was kind enough to read my chapters dealing with Domicil, and to raise some fruitful queries which led me to add several pages in the interest of further elucidation; to Mr. E. S. P. Haynes, of 9, New Square, Lincoln's Inn, so well known as a writer on the Law of Divorce,

who read my chapters, 'The New Legislation' and 'The Sham of Separations' in proof and gave me the confidence of his approval ; and to Mr. G. B. Crowder, of 51, Lincoln's Inn Fields, who on more than one occasion has given his kind attention to points of law which seemed to me to require verification. In acknowledging my indebtedness to these authorities I am in no way committing them to concurrence with my thesis or to responsibility for the final form in which my book appears.

J. F. W.-B.

# CONTENTS

PREFACE	page 7
LIST OF STATUTES CITED	17
LIST OF CASES CITED	19
LIST OF LAW REPORTS CITED	23
INTRODUCTION	25

## BOOK I

### MARRIAGE AND DIVORCE IN HISTORY

CHAP. I. ANCIENT MARRIAGE AND THE ROMAN CIVIL LAW	35
II. THE CONTRIBUTION OF CHRISTIANITY	45
III. CHANGES UNDER THE CHRISTIAN EMPERORS	69
IV. THE CANON LAW IN MATRIMONIAL CAUSES	75
V. EFFECTS OF THE REFORMATION	97
VI. THE NEW LEGISLATION IN ENGLAND	120

## BOOK II

### RELIEF UNDER THE PRESENT LAW

SECT. I. POSSIBILITIES OF RELIEF	153
(i) Annulment	153
(ii) Dissolution	155
(iii) Separation	156
SECT. II. BARS TO RELIEF	160
CHAP. I INITIAL BARS	160
II. BARS TO ANNULMENT (JURISDICTION: DOMICIL)	162

CHAP. III. BARS TO DISSOLUTION	page 169
(i) Jurisdiction (Domicil)	169
(ii) Absolute Bars	171
(iii) New Rule in <i>Russell v. Russell</i> (1924)	177
(iv) Discretionary Bars: <i>Apted v. Apted &amp; Bliss</i> (1930)	177
(v) The King's Proctor	190
(vi) Separations as Bars	192
IV BARS TO SEPARATION	196

## BOOK III

## A PLEA FOR REFORM

SECT. I. THE INDICTMENT	201
GENERAL CHARGE: THE FAILURE OF THE ECCLESIASTICAL CONCEPTION OF MARRIAGE AND THE ANCILLARY LEGAL SYSTEM	201
CHAP. I. INDISSOLUBILITY AND THE CHALLENGE OF LIFE	201
II. RESTRICTIONS ON DIVORCE: A 'PENAL' LAW	217
III. INNOCENCE, GUILT AND 'CAMOUFLAGE'	225
IV. THE MISINTERPRETATION OF THE DISCRETION	238
V. RE-MARRIAGE: ECCLESIASTICAL OBSTRUCTIONS	251
VI. THE SHAM OF SEPARATIONS	268
VII. DIFFICULTIES OF DOMICIL	283
VIII. THE NEED FOR NEW GROUNDS	316
SECT. II. DIVORCE: 'NOT A DISEASE, BUT A REMEDY'	331
CHAP. I. SEXUAL REFORM AND SOCIAL BENEFIT	331
II. EASIER DIVORCE EXONERATED FROM EVIL EFFECTS	346

BOOK IV

A RATIONALE OF REFORM

<i>SECT.</i>	<i>I. ANNULMENT</i>	<i>page</i>	363
	(i) Jurisdiction		363
	(ii) New Grounds		364
<i>SECT.</i>	<i>II. DISSOLUTION</i>		365
<i>CHAP.</i>	<i>I. JURISDICTION</i>		365
	<i>II. NEW GROUNDS: INCOMPATIBILITY AND MUTUAL CONSENT</i>		367
	(I) PROPOSALS AND PROCEDURE		367
	(i) Defended Suits		369
	(ii) Undefended Suits		376
	(iii) Petitions by Mutual Consent		376
	(iv) Miscellaneous Provisions		378
	(II) OBJECTIONS CONSIDERED		379
	<i>III. LIMITATION OF THE BARS TO RELIEF</i>		384
	<i>IV. THE PROTECTION OF MARRIAGE</i>		388
	(i) Pre-Marital Consultation and Inspection		388
	(ii) Longer Official Notice of Intention		389
	(iii) No Petition within Three Years of Marriage		390
	(iv) Stricter Scrutiny of Collusive Suits		390
	(v) Provisions for Re-Marriage		391
	(vi) Limitations on Re-Marriage		392
<i>SEGT.</i>	<i>III. SEPARATION</i>		393
	(i) Abolition of Permanent Separations		393
	(ii) Procedure in the case of—		
	(a) Judicial Separation		393
	(b) Separation Orders and Deeds of Separation		395

CONCLUSION	<i>page</i> 397
APPENDICES: I. The Judicature (Consolidation) Act, 1925 (15 and 16 Geo. V, c. 49); Text of ss. 176-187	401
II. Grounds of Divorce in other Countries	406
III. A Note on Prehistoric Marriage	412
IV. Bibliography	417
INDEX	421

# LIST OF STATUTES CITED

			PAGE
Statute of Provisors	(24 Ed. III, st. iv)	1351	106
Statute of Praemunire	(16 Rich. II, c. 5)	1393	106
Royal Pardons to the Clergy	(22 Henry VIII, c. 15		
and Commons Under Prae-	& 16)	1531	107
munire	(23 Henry VIII, c. 19)	1532	107
Annates Act	(23 Henry VIII, c. 20)	1532	107
Statute of Appeals	(24 Henry VIII, c. 12)	1533	107
Submission of the Clergy	(25 Henry VIII, c. 19)	1534	107
2nd Annates Act	(25 Henry VIII, c. 20)	1534	107
Succession to the Crown	(25 Henry VIII, c. 22)	1534	108
Revision of the Canon Law	(27 Henry VIII, c. 15)	1535-6	111
Succession to the Crown	(28 Henry VIII, c. 7)	1536	108, 109, 114
Dissolution of Marriage of	(32 Henry VIII, c. 25)	1540	109
Anne of Cleves			
Pre-contracts and Consan-	(32 Henry VIII, c. 38)	1540	109-10, 113
guinity			
Revision of the Canon Law	(35 Henry VIII, c. 16)	1543-4	111
Repeal of 32 Henry VIII, c. 38	(2 & 3 Ed. VI, c. 23)	1548	111
Revision of the Canon Law	(3 & 4 Ed. VI, c. 11)	1549-50	111
Repeal of Provisions against	(1 & 2 P. & M., c. 8)	1554	113
the See of Rome			
Act of Supremacy	(1 Eliz. c. 1)	1559	113
Act of Uniformity	(1 Eliz. c. 2)	1559	113
Bigamy	(1 Jac. I, c. 11)	1603	114
Rates and Duties on Marriage	(6 & 7 Will. III, c. 6)	1695	116
Lord Hardwicke's Act	(26 Geo. II, c. 33)	1753	117
Marriage of Lunatics Act	(51 Geo. III, c. 37)	1811	154, 317
Marriage Act	(4 Geo. IV, c. 76)	1823	117
Marriage Act	(6 & 7 Will. IV, c. 85)	1836	118
Probate Act	(20 & 21 Vict. c. 77)	1857	123
Matrimonial Causes Act	(20 & 21 Vict. c. 85)	1857	120 ff. and <i>passim</i>
Matrimonial Causes Act	(21 & 22 Vict. c. 108)	1858	125
Matrimonial Causes Act	(22 & 23 Vict. c. 61)	1859	129
Matrimonial Causes Act	(23 & 24 Vict. c. 144)	1860	123-4
Offences against the Person	(24 & 25 Vict. c. 100)	1861	114
Act			
Matrimonial Causes Act	(29 & 30 Vict. c. 32)	1866	124
Matrimonial Causes (Divorce	(31 & 32 Vict. c. 77)	1868	143
Amendment)			
Debtors Act	(32 & 33 Vict. c. 62)	1869	274
Matrimonial Causes Act	(36 & 37 Vict. c. 31)	1873	144
Judicature Act	(36 & 37 Vict. c. 66)	1873	122-3



Statute Law Revision Act	(38 & 39 Vict. c. 66)	1875	123
Matrimonial Causes Act	(41 & 42 Vict. c. 19)	1878	144, 268
Habitual Drunkards Act	(42 & 43 Vict. c. 19)	1879	146, 157
Married Women's Property Act	(45 & 46 Vict. c. 75)	1882	141, 353
Bankruptcy Act	(46 & 47 Vict. c. 52)	1883	122
Matrimonial Causes Act	(47 & 48 Vict. c. 68)	1884	125, 136
Statute Law Revision Act	(55 & 56 Vict. c. 19)	1892	123
Foreign Marriage Act	(55 & 56 Vict. c. 23)	1892	314
Married Women's Property Act	(56 & 57 Vict. c. 63)	1893	141, 353
Summary Jurisdiction (Married Women) Act	(58 & 59 Vict. c. 39)	1895	145, 192 ff., 268 ff.
Licensing Act	(2 Ed. VII, c. 28)	1902	146
Matrimonial Causes Act	(7 Ed. VII, c. 12)	1907	140 n.
Deceased Wife's Sister's Marriage Act	(7 Ed. VII, c. 47)	1907	133, 259 ff.
Juries Act	(8 & 9 Geo. V, c. 25)	1918	134
Married Women Maintenance Act	(10 & 11 Geo. V, c. 63)	1920	146
Administration of Justice Act	(10 & 11 Geo. V, c. 81)	1920	134
Deceased Brother's Widow's Marriage Act	(11 & 12 Geo. V, c. 24)	1921	133, 259 ff.
Matrimonial Causes Act	(13 & 14 Geo. V, c. 19)	1923	129, 155, 193 ff., 273
Administration of Justice Act	(15 & 16 Geo. V, c. 28)	1925	134
Guardianship of Infants Act	(15 & 16 Geo. V, c. 45)	1925	374
Judicature (Consolidation) Act	(15 & 16 Geo. V, c. 49)	1925	120 ff., 401 ff. and <i>passim</i>
Summary Jurisdiction (Separation & Maintenance) Act	(15 & 16 Geo. V, c. 51)	1925	146, 192 ff., 268 ff.
Indian & Colonial Divorce Jurisdiction Act	(16 & 17 Geo. V, c. 40)	1926	148, 307 f.
Legitimacy Act	(16 & 17 Geo. V, c. 60)	1926	148, 266
Judicial Proceedings (Regulation of Reports) Act	(16 & 17 Geo. V, c. 61)	1926	148
Age of Marriage Act	(19 & 20 Geo. V, c. 36)	1929	148
Marriage Measure	(20 Geo. V, No. 3)	1930	148, 389
Marriage (Prohibited Degrees of Relationship) Act	(21 & 22 Geo. V, c. 31)	1931	148, 260 f.

# LIST OF CASES CITED

		PAGE
A. v. B. & Another	(1868), L.R. 1 P. & D. 559	294, 299, 305
Allen v. Allen & Bell	[1894] P. 248, C.A.	233 ff.
Anichini v. Anichini	(1839), 2 Curt. 210	180, 231
Anthony v. Anthony	(1919), 35 T.L.R. 559	318
Apted v. Apted & Bliss	[1930] P. 246; 46 T.L.R. 456	8, 182 ff, 225, 239 ff.
Armitage v. A.-G.	[1906] P. 135	306 n., 315
Armytage v. Armytage	[1898] P. 178	169
A.-G. for Alberta v. Cook	[1926] A.C. 444	162, 170, 284, 293, 306
Attwood (otherwise Pomeroy) v. Attwood	[1903] P. 7	378
Aylward v. Aylward	(1928), 44 T.L.R.	234
A. (otherwise M.) v. M.	(1884) 10 P.D. 178	378
Bailet v. Bailet	(1901), L.T. 272	314
Barnes v. Barnes	(1867), L.R. 1 P. & D. 505	174
Bateman v. Ross	(1813), 1 Dow. 235	176
Bartlett (falsely called Rice) v. Rice	(1894) 72 L.T. 122	255
Bell v. Kennedy	(1868), L.R. 1 Sc.App. 319	163, 283
Bland v. Bland	(1866), L.R. 1 P. & D. 237	193
Bosworthick v. Bosworthick	(1901) 50 W.R. 217	127
Boulting v. Boulting	(1864), 3 Sw. & Tr. 329	173
Boulton v. Boulton	[1922] P. 229	193
Brinkley v. A.-G.	(1890), 15 P. & D. 76	307
Bromley v. Bromley	(1793), 2 Add. 158 n.	156
Burton v. Burton	(1873), 21 W.R. 648	284 n.
Butler v. Butler; Butler v. Butler & Burnham (Queen's Proctor Intervening)	(1890) 15 P.D. 66; [1894] P. 25	174
B—n v. B—n	(1854), 1 Ecc. & Ad. 248	319
C. v. C.	(1905) 22 T.L.R. 26	127
Chichester v. Donegal	(1822) 1 Add. 5	297
Churner v. Churner	(1912) 106 L.T. 769	192
Clarke v. Clarke & Clarke	(1865), 34 L.J. (P.M. & A.)	178 ff.
Clarkson v. Clarkson	(1930), 46 T.L.R. 623	128
Coffey v. Coffey	[1898] P. 169	127
Coleman v. Coleman	(1866), L.R. 1 P. & D. 81	180, 230
Conradi v. Conradi	(1868) L.R. 1 P. of D., 514	160
Constantinidi v. Constantinidi and Lance	[1903] P. 246	180 f., 245
Cooper (falsely called Crane) v. Crane	[1891] P. 369	255

Couzens v. Couzens (King's Proctor intervening)	(1931), <i>The Times</i> , June 26th	190
Cox v. Cox & Warde	[1901] P. 267	135
Crocker v. Crocker	[1921] P. 25, C.A.	176
Curtis v. Curtis	(1858) 1 Sw. & Tr. 75	375
<i>In re Daly's Settlement</i>	(1858), 25 Beav. 456	283
Dillon v. Dillon	(1842), 3 Curt. 86	173
Dodd v Dodd	[1906] P. 189	158, 193, 197, 269 ff., 321, 393
Dolphin v. Robbins	(1859) 7 H.L.C. 390	170
Dowling v Dowling	[1898] P. 228	176
E. v. E. (otherwise T.)	(1900), 50 W.R. 607	162
Elliott v. Gurr	(1812) 2 Phill. 16	302 n.
Elwes v. Elwes	(1795), 1 Hag. Con. 276	128
Evans v. Evans	(1790), 1 Hag. Ecc. 35, 120	196
Finney v. Finney	(1868), L.R. 1 P. & D. 483	160
Forster (otherwise Street) v. Forster	(1923), 39 T.L.R. 658	317
Foster v. Foster	[1921] P. 438	156
Fullerton v. Fullerton	(1922), 39 T.L.R. 46	176, 194
Furness v. Furness	(1860), 1 Sw. & Tr. 61	176
G. v. G.	[1924] A.C. 349	229, 319
Gifford v. Gifford & Freeman	(1927), 43 T.L.R. 141	173
Gipps v. Gipps & Hume	(1863), 3 Sw. & Tr. 116; (1864), 11 H.L. C. 11	173
Gleen v. Gleen	(1900), 17 T.L.R. 62	318
Gray v. Gee	(1923), 39 T.L.R. 429	135
Green v. Green	(1873), L.R. 2 P & D. 121	176, 194
H. v. H.	[1928] P. 206	170
Hanbury v. Hanbury	[1892] P. 222	160
Harford v. Morris	(1776) 2 Hag. Con. 423	255
Harriman v. Harriman	[1909] P. 123 C.A.	158, 161, 193, 197, 272
Harvey (otherwise Farnie) v. Farnie	(1880), 6 P.D. 35, C.A. (1882), 8 App. Cas. 43	283
Hawkins v. Hawkins & Hope	(1885), 1 P.D. 177	173
Hodgson v. Hodgson & Turner	[1905] P. 233	196
Horn v. Horn	(1929) 141 L.T. 93	170
Hulton v. Hulton	(1916), T.L.R. 137	140
Hunt v. Hunt	(1856), Dea. & Sw. 121	128
Hyde v. Hyde & Woodmansee	(1866) L.R. 1 P. & D. 130	307, 311
Inverclyde (otherwise Tripp) v. Inverclyde	[1931] P.29; 47 T.L.R. 140	8, 167 f., 283 ff., 363
Jackson (otherwise Macfarlane v. Jackson)	[1908] P. 308	317

## LIST OF CASES CITED

21

PAGE

Jessop v. Jessop	(1861), 2 Sw. & Tr. 301	174
Johnson v. Cooke	[1898] 2 I.R. 130	297
Jolly v. Jolly & Fryer	(1919), 63 Sol. Jo. 777	128
Joseph v. Joseph & Wentzel	(1865), L. J. (P.M. & A.), 96	180
Kelly v. Kelly	(1869) L.R. 2 P. & D. 59	127
L. v. L.	[1931] P. 63	175
L. v. L. (otherwise D.)	(1922), 38 T.L.R. 697	319
Laidler v. Laidler	(1920), 36 T.L.R. 510	175
Le Mesurier v. Le Mesurier	[1895] A.C. 517	169 ff., 290, 306 f., 363
Le Sueur v. Le Sueur	(1876) 1 P.D. 139	170
Linke (otherwise Van Aerde) v. Van Aerde	(1894), 10 T.L.R. 426	163 f.
Lord Advocate v. Jaffrey	[1921] 1 A.C. 146	170
Loveden v. Loveden	(1810), 2 Hag. Con. 1	233 ff.
<i>In re</i> Mackenzie v. Edwards-Moss	[1911] 1 Ch. 578	170
Marsh v. Marsh	(1877), 47 L.J.P. 34	138
Mason v. Mason	(1883), 8 P.D. 21 C.A.	194
Melvill v. Melvill & Wood	[1930] P. 99, 159 C.A.	139
Mitford v. Mitford & Von Kuhlmann	[1923] P. 130	294
Moorsom v. Moorsom	(1792), 2 Hag. Ecc. 87, 107	172
Morgan v. Morgan & Porter	(1869), L.R. 1 P. & D. 644	8, 179 ff., 239 ff.
Morton v. Morton	(1916), 32 T.L.R. 484	230
Moss v. Moss (otherwise Archer)	[1897] P. 263	319
Nachimson v. Nachimson	[1930] P. 85, 217 C.A.	307, 311 ff.
Newbould v. A.-G.	[1931] P. 75	298 ff.
Niboyet v. Niboyet	(1878), 4 P.D. 1	169, 297 n.
Norman v. Norman	[1908] P. 6	161, 176, 230
Norton v. Seton	(1819) 3 Phill. 147	299
Ogden v. Ogden (otherwise Philip)	[1908] P. 46	164 ff., 169 f., 290 n., 293, 301, 307 ff., 363
Oldham v. Oldham	(1930), <i>The Times</i> , Mar. 25th	235
P. v. P.	[1916] 2 I.R. 400 C.A.	285
Parry v. Parry	[1896] P. 37	179
Parsonage v. Parsonage	(1930), <i>The Times</i> , Mar. 4th	235
Pickett v. Pickett	(1928), 73 Sol. Jo. 144	142
Pollard v. Pollard	[1894] P. 172	138
Pretty v. Pretty	[1911] P. 83	226
Prinsep v. Prinsep	[1929] P. 225. [1930] P. 49	138
Pulford v. Pulford	[1923] P. 18, 21	278
Robertson v. Robertson	(1881), 6 P.D. 119, C.A.	142
Robinson v. Robinson	(1877), 2 P.D. 75	160

		PAGE
Rogers v. Rogers	(1792), 2 Hag. Ecc. 57	172
Rose v. Rose	(1883), 8 P.D. 98	175, 230
Rowley v. Rowley	(1864), 3 Sw. & Tr. 338	175
Ruding v. Smith	(1821), 2 Hag. Con. 371	314
Russell v. Russell	[1924] A.C. 687 H.L.	177
Rutherford v. Rutherford (Richardson intervening)	[1922] P. 144, C.A. [1923] A.C. 1	128, 161, 271
S. v. S. (otherwise M.)	(1908), 24 T.L.R. 253	162
Salvesen v. Administrator of Austrian Property	[1927] A.C. 641 8, 165 ff.,	284 ff., 364
Scott v. Scott	[1913] P. 52	174 f.
Scott (falsely called Sebright) v. Sebright	(1886) 12 P.D. 21	255
Scrimshire v. Scrimshire	(1752) 2 Hag. Con. 395	294
Shaw v. A.-G.	(1870), L.R. 2 P. & D. 156	307
Simonin v. Mallac	(1860), 2 Sw. & Tr. 67	163
Sottomayor v. De Barros	(1877), 3 P.D. 1. (1879), P.D. 94	163 ff., 214, 215, 312
Sparrow (falsely called Harrison) v. Harrison	(1841), 3 Curt. 16	162
Stone v. Stone	(1844), 3 Notes of Cases	278 173
Stuart v. Stuart & Holden	[1930] P. 77	185
Symons v. Symons (Queen's Proctor intervening)	[1897] P. 167	180, 225
Thompson v. Dibdin	(1912), C.A. 533	258
Thompson v. Thompson	(1901) 85 L.T. 172	127
Tickner v. Tickner	(1924), 40 T.L.R. 367	181
Turner v. Meyers (falsely calling herself Turner)	(1808), 1 Hag. Con. 414	317
Turner (falsely called Thompson) v. Thompson	(1888) 13 P.D. 37	283, 294, 297, 300, 305, 306 n., 310
Walker v. Walker	(1898), 77 L.T. 715	324
Walker v. Walker	(1912), 107 L.T. 655	318
Warren v. Warren	[1925] P. 107	177
Warrender v. Warrender	(1835) 2 Cl. & F. 488	312
Wickins v. Wickins	[1918] P. 265, C.A.	181, 245
Willey v. Willey	(1878), 26 W.R. 239	179
Wilson v. Wilson	(1872), L.R. 2 P. & D. 435	291
Wilson v. Wilson	[1920] P. 20; 36 T.L.R. 91	181 ff., 225, 239 ff.
Winans v. A.-G.	[1904] A.C. 287	283
Woolf v. Woolf	(1930), <i>The Times</i> , Ap. 1st, 11th. Nov. 6th, Feb. 18th	235 f.
Worsley v. Worsley & Wignall	(1869), L.R. 1 P. & D. 648,	137
Yeatman v. Yeatman & Rummell	(1870), 21 L.T. 733	158, 194

## LIST OF LAW REPORTS CITED

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## INTRODUCTION

The reform of the English Law of Marriage and Divorce, energetically urged by those who are professed reformers, has become a matter of public interest in an age of new knowledge which questions the old authorities. A large measure of public opinion has grown from the discovery that the law frequently fails to do justice in divorce suits, or that, if it gives relief where relief is needed, this is sometimes at the cost of admitting doubtful devices to enlarge a narrow law. The present law in Matrimonial Causes is a legacy of the past, not the creation of modern lawyers. It contains all too large a measure of the mediaeval Canon Law, which supplanted the old Roman Civil Law on the Continent of Europe and the indigenous Anglo-Saxon law and custom of marriage and divorce in England.

It is true that the Matrimonial Causes Act of 1857, which with certain amendments remains the law of this realm, seemed to the less understanding minds in the mid-Victorian period which produced it to be a revolutionary measure. For this Act removed the venue of matrimonial and divorce proceedings from the old Ecclesiastical Courts, dispensed with the cumbrous and costly expedient of a private Act of Parliament (by which procedure alone a dissolution of marriage had been obtainable since Reformation times), and gave power to the new Crown Court to grant complete divorces on the one ground which had been admitted in the previous Parliamentary procedure, together with permission to both parties to a suit to be re-married in their Parish Churches. At the time of its passage into law the Act of 1857 was accounted a progressive measure; and in spite of the fact that the then Archbishop of Canterbury, the Bishop of London, and a number of other Bishops voted with those who would be called the 'progressives' in the House of Lords, the religious mind of the period resented the relief which it gave and prophesied a flood of broken marriages at the rate of ten a day. But this prophecy went unfulfilled for many years, and divorce remained a difficult process except in case of persons who were favourably placed and able to figure in what may be called 'straightforward' suits. For in truth, while the new Act changed the Court wherein matrimonial causes were to be heard



and in one respect increased the facilities for a decree of dissolution of marriage, it retained wherever possible the principles and procedure of the old Ecclesiastical Courts.

At the end of the 19th century a trifling tendency towards more liberal construction of the law became apparent, as the temper of that time grew more humane and less disposed to regard the institution of marriage from ecclesiastical presuppositions. As evidence of the growing sympathies of the age it may be noted that Marriage with a Deceased Wife's Sister was legalized in 1907,<sup>1</sup> although the corresponding Marriage with a Deceased Brother's Widow had to wait until 1921.<sup>2</sup> In the earlier period, however, the demand for the reform of the law secured the appointment of a Royal Commission on Divorce and Matrimonial Causes. This Commission sat under the chairmanship of the late Lord Gorell, for many years a Judge and sometime President of the Probate, Divorce and Admiralty Division, who had already been unwearied in his arguments for the reform of the law of which he knew the inadequacy and the failure from his large experience as a judge. The evidence showed the large dissatisfaction of intelligent minds with the state of the law: and was illuminated by the opinions of a number of theological scholars to the effect that the supposed indissolubility of marriage could not be upheld by serious reference to the Gospels.

The Royal Commission, appointed in 1909, rose from its labours in 1912. Its weighty report, with recommendations for reform supported by the minutes of evidence, was issued in 1912, only to be torpedoed by an obstructive Minority Report, produced under ecclesiastical influence, signed by two bachelors and an ecclesiastical lawyer, published as a flysheet, and broadcast far more widely than the full and considered report of the Majority. The Majority Report, which was based on elaborate and extensive evidence, drawn from all quarters, to show the vast volume of preventable matrimonial misery, represented the experienced mind of the time. Its recommendations concentrated chiefly on the extension of the grounds for divorce, to include Adultery (as at present), Wilful Desertion, Cruelty, Incurable Insanity, Habitual Drunkenness, and Imprisonment in the form of a commuted death sentence. These grounds, carefully defined, would readily be verified in the Courts; and a recognition of

<sup>1</sup> 7 Ed. VII, c. 47.

<sup>2</sup> 11 & 12 Geo. V, c. 18.

them would obviate much misconduct in the form of adultery, often undesired by the parties and sometimes fabricated, of which evidence is now required in order to effect a dissolution of marriage. The Minority signatories admitted that the present liberty of divorce could not be curtailed; but they maintained, against any extension of such liberty, the ecclesiastical position inherited from the ages of ignorance, and only added their agreement with some of the Majority recommendations where these would not violate that position further than did the existing law. Then the War came; the Law went unreformed; and the epidemic of hasty marriages, which came as an eruption from the War, imposed an acid test upon the Divorce Law. The experience showed incidentally that there are reasons why it is important that marriage, rather than divorce, should be the subject of restriction, and that, while it is a fair contention that the law allows divorces to be obtained too easily when they ought to be difficult, yet the law raises difficulty to the level of impossibility where multitudes of men and women need relief by dissolution, and the substitution of a happy union for an incompatible one, as the condition of the development of their lives.

Another attempt was made in 1920. Lord Buckmaster's Bill, which aimed at an extension of the grounds for divorce on the lines of those which the Royal Commission recommended (excepting the Commuted Death Sentence), survived a great fight in the House of Lords, where it was carried by a good majority. But it was made the subject of a hostile amendment in the House of Commons and went no further. The only reforms of serious moment for our subject, among all the new Acts bearing on Matrimonial Causes in these post-War years, are the equalizing of the sexes on the point that a wife can now obtain a divorce from her husband on the ground of a single act of adultery, without further proof of cruelty or desertion;<sup>1</sup> the extension of facilities to Poor Persons in the matters both of costs and of the transfer of their divorce suits to Assizes;<sup>2</sup> the possibilities of divorce in India and the British Dominions for European residents whose domicil is in England or Scotland;<sup>3</sup>

<sup>1</sup> M.C. Act, 1923 (13 & 14 Geo. V, c. 19).

<sup>2</sup> M.C. at Assize Order, 1922; Rules for Trial at Assizes, 1922; R.S.C. (Poor Persons), 1925.

<sup>3</sup> Indian and Colonial Divorce Jurisdiction Act (16 & 17 Geo. V, c. 40).

and, following the Deceased Brother's Widow Act of 1921 (already mentioned), the extension of the principle in 1931 to include a nephew or niece by marriage.<sup>1</sup> All the Acts which appertain to marriage are mentioned in their appropriate places in the text,<sup>2</sup> and here there need only be added the curtailment of the publication of Divorce Court proceedings in the Press.<sup>3</sup> Yet, few and limited as these reforms have been—for none of them has extended the grounds for divorce beyond that of adultery—most of them, probably including even that curtailing Press reports (through the moral effect of reduced publicity on some minds), have increased the number of divorces. It cannot be maintained that these reforms are adequate, even though some of them are on many counts desirable. True reform of the Divorce Law does not lie in extreme facility of divorce through one narrow channel; and these reforms tend, through the continued limitation of facilities to the one traditional ground, to open more widely the floodgates of familiar abuse.

This last reflection lies less against the parties who seek relief than against the system which determines the conditions on which relief can be granted. For, whereas many spokesmen of the Church lament the large increase in the number of divorces, and interpret this to mean a decline in Christian morals and a fulfilment at length of the prophecies of the opponents of the Act of 1857, others, who hold an equally high ideal of marriage, also regret the increase in the number of divorces, but for a different reason, viz. because it reveals so large a number of unhappy marriages from which both law and custom have prevented relief in the past. The more intelligent mind of the age perceives the failure of an inherited system which makes sexual immorality the sole condition of divorce. A variety of grounds such as was recommended by the Royal Commission and incorporated in Lord Buckmaster's Bill of 1920 is more likely to enable a petitioner to obtain a divorce on the true ground of matrimonial failure, instead of always having to prove the adultery of a respondent; and such facility for escape on the part of the injured party may well stimulate the other, who is the aggravating cause—the 'guilty' party, although the guilt may not be adultery,

<sup>1</sup> Marriage (Prohibited Degrees of Relationship) Act (21 & 22 Geo. V, c. 31).

<sup>2</sup> Book I, Chapter VI.

<sup>3</sup> Judicial Proceedings (Regulation of Reports) Act (16 & 17 Geo. V, c. 61).

but cruelty or desertion—to be more pleasing and affectionate. Divorce to-day is easy enough where there is available proof or where the parties are agreed and properly instructed; but, if only one party desires divorce, and cannot prove the adultery of the other, it can be so difficult that the other can be inconsiderate almost with impunity.

In present conditions the law frequently fails to give relief where relief is needed; or it requires evidence of sexual immorality, in a case in which this is not the true ground, as the only condition on which the parties can obtain relief. It is no doubt a far cry to divorce by mutual consent, or to any form of the *repudium*, which were the satisfactory working rules of the old Roman Civil Law; and at present the English Law insists upon a suit, wherein not merely one party prays for relief on the statutory ground to which the other party may or may not consent, but an 'innocent' party challenges a 'guilty' party, i.e. a party who is guilty in fact or in form on the sole count of adultery. But if both parties have fulfilled the requisite condition, i.e. if both parties have committed adultery, then the customary interpretation of the discretion, with which the Act of 1857 (*supra*) (s. 31)<sup>1</sup> invested the Court, gave for many years a virtual assurance that the law will insist on the parties remaining united. The recent tendency to more liberal exercise of the discretion has qualified this disability; and it is only by this judicial interpretation and adaptation to modern needs in this and other issues that our antiquated and ecclesiastically inspired Marriage and Divorce Laws have survived in a world which has outgrown them.

This condition of relief, and the theoretical antagonism which must be maintained in the Court between the parties, when often enough both of them equally seek escape from an intolerable union, are due to the survival of ancient ecclesiastical canons which have directed the principles of the law and to a large extent continue to govern present practice in the Courts. There is genuine guilt in what may be called 'straightforward' suits, i.e. those in which one party is actually affronted by the adultery of the other and seeks a dissolution on that clear ground. But, as is now well known, these suits are not representative. The particular and technical guilt, of which the Court requires evidence

<sup>1</sup> Repealed and re-enacted by the Judicature (Consolidation) Act, 1925 (15 & 16 Geo. V, c. 49), s. 178 (3).

under the present law, is frequently but incidental to larger causes of matrimonial disagreement. Our inherited system imposes a penalty of guilt upon people who are not guilty. The new legislation of the 19th century, which was aimed at effecting reform and extending relief, has been administered on precedents which are mediaeval in origin and spirit. The larger understanding of marriage in the modern world, together with the growth of women's rights, goes to show the inadequacy and the evil incidence of a law which is so subject to ecclesiastical influence that it promotes the worst offences in the scale of ecclesiastical sin!

Those who realize these weaknesses of the Law in Matrimonial Causes are not confined to the legal profession; nor are those who share the larger understanding of human marriage by any means all professed biologists or experts in the psychology of sex. And it may truly be maintained that those who on religious grounds fight against freedom and improved conditions of relief are far from being the most enlightened churchmen. A large, powerful and growing opinion to-day is based not directly on expert legal, scientific or ecclesiastical lore, but on a generally intelligent perception of a defective system and of the fact that there must be some possibility of its correction. Not themselves being necessarily lawyers, scientists, psychologists or ecclesiastics, many people read the works of specialists, correlate arguments and conclusions with their own experience of life, and, in this matter of marriage and divorce, with reported cases in the Courts or with the matrimonial troubles of their friends; and they are sharp enough to see where the shoe pinches.

It is, of course, the case that specialties in these days tend to be contracted within the area of an almost isolated subject; so that, as Professor Julian Huxley says somewhere of Science, 'its right hand knoweth not what its left hand doeth.' But the subject of Marriage and Divorce cannot quite become a speciality in this sense. It is the concern of too large a company, and the meeting-point of too many specialties, to be thus confined. It cannot be treated without invasion of the fields of sexology, psychology, theology and law. We are familiar with histories of human marriage, studies in psychology and sex, and volumes of ethics in which the weapons of the theological armoury are sometimes wielded in the cause of human progress, but too commonly used against the relief of human calamity. These must all refer to

law, because marriage must ever be regulated by law. The course of spiritual and sexual development, where marriage is concerned, may be frustrated by a law which professes falsely to uphold the social, or the moral, as against the individual, or the licentious interest, while the same law encourages factitious sexual immorality. Moreover the ecclesiastic who opposes all divorce—and even abjures the Roman Canon Law (which otherwise inconsistently enough he invokes as an authority against the law of the realm) because it provides for annulment on a variety of grounds—inveighs against a bad law, not because he would enlarge it but because he would wish it narrower. The law is the touchstone of our subject; and in the matter of Divorce as distinguished from Nullity, the Canon Law, which has outlived its day, is a dark blot on English justice and the *bête noir* of all who realize that large and liberal marriage laws are the corrective of sexual immorality and the key to matrimonial stability. The Canon Law was an ecclesiastical expedient which ministered to the power of the mediaeval papacy over private life, but had little relation to Christianity or to social needs. Yet the survival of Canon Law principles in English law has almost achieved the disastrous identification of Christianity with cruelty. The Catholick Church is the arch-enemy of progressive life; and Protestants who oppose the reform of our Marriage and Divorce Laws are deluded disciples of the Pope.<sup>1</sup>

Thanks to this legacy, the law is the least studied and probably the most abused of the specialties with which marriage and divorce reformers are concerned. 'Law,' wrote Dr. Müller-Lyer, 'always limps behind the onward march of thought and custom: law is the petrification of the past.'<sup>2</sup> For, although the law is the sphere of practical reform, it is through knowledge in other departments of the subject that public opinion will be made and shaped, and the reform of the law itself will be effected. The law itself is largely independent of these incursions into other fields. The lawyer addresses himself to what is the law, the statutes and the last decision of the last judge; and happily for his comfort he need not greatly concern himself with what

<sup>1</sup> 'Deluded' because, while they suppose the Roman refusal of divorce to be good Christianity, they would find that their discipleship carried subscription to the system of nullity which they dislike as much as divorce.

<sup>2</sup> *The Family*, by Dr. Müller-Lyer (1912), translated by F. W. Stella Browne (1931), p. 256.

was, or what might be or what ought not to be. Statute, precedent and practice will tell him with tolerable certainty what the law is now; and the next case will settle its own point of doubt either at first instance or on appeal. Vast, involved and almost insoluble as some of his problems are, they do not lead him so far from his own science as the other specialists must travel if they would visualize the matrimonial reforms which they propose in the sphere of their practical action, to wit, the Courts. The law is reformed by the Legislature. To this end Opinion must first demand reform, perhaps under the tuition of some percipient and progressive lawyer; and it lies with lawyers again to fashion and draw up the statutory legislation which is required. Perhaps it may be suggested that Opinion, which will demand a reformed law, will be assisted by knowledge of existing law as that may be conveyed from the aspect of potential reform. For this purpose not primarily a study of marriage, with the aid of sexology and theology, is needed—with some bare reference to law—for such is readily available in the large library of Marriage as a theme of perennial human interest;—but a new study of the controversial issues in the Law of Marriage and Divorce in England in the light of sexology and theology. This project, if successful, will show the possibility of reform in accordance with new knowledge and progressive opinion, whether by wider interpretation of the present Law in Matrimonial Causes or by new enactments amending or superseding the well-intentioned but inadequate achievements of the Reformers of 1857 and their successors.

*BOOK I*

MARRIAGE AND DIVORCE IN HISTORY





## CHAPTER I

### ANCIENT MARRIAGE AND THE ROMAN CIVIL LAW

To enquiring into the present Marriage and Divorce Laws in England, and the possible course of their reform, we must take a flying visit to antiquity. For, as we noted in the Introduction, the English Law in Matrimonial Causes is not the creation of modern lawyers; but, in spite of reforms of the system and the growth of case law, the principles underlying present practice are a legacy of the past, and were derived from the Canon Law of the Catholick Church. This, however, was itself a development, and on many counts a reactionary development, from more ancient systems: for it was an attempt to formulate a Christian law of marriage on the basis of the literal reading of the texts of the New Testament, and to substitute this Christian legislation for the Civil Law of Marriage which the Church inherited from the Empire. The true source of matrimonial legislation is to be found in the Republic and the Empire of Rome. Of the Romans, as the late Lord Bryce wrote in his monumental *Studies in History and Jurisprudence*, 'we may say that it is they who have built up the marriage law of the civilized world, partly by their action as secular rulers in pagan times, partly by their action as priests in Christian times.'<sup>1</sup> To-day, after the long reign of the Canon Law in Europe, the principles of the old Roman Civil Law have emerged again and have enjoyed some measure of restoration in many countries. But in England it has been the case hitherto that reforms effected, and even reforms proposed to the Legislature, have not escaped the principles of the Canon Law. For the Canon Law disallowed as a ground for divorce, in its own limited variety, that consent which is an essential to self-respecting marriage, and insisted that every matrimonial cause should appear as a suit in which the parties are mutually antagonistic. Yet it may be said that the recognition of this principle of consent, in the place of an artificial antagonism, is a return to ancient wisdom. For, while it is sometimes suggested that mutual consent, as in the Roman Civil Law, would allow a marriage to be dissolved at the instance of a passing whim, the recognition of this

<sup>1</sup> Vol. II, p. 786.

principle of consent does not necessarily involve the removal of matrimonial causes from the Courts. Nor need the hearing of joint petitions exclude the alternative hearing of suits wherein a petitioner prays for relief without the consent of the other party. The Roman Law provided for divorce in both kinds, and offers the basis of a modern reconstruction.

It is not to be supposed that the Roman Law of husband and wife was complete and in any sense satisfactory until after considerable development from its early stages. The Romans of the law-making period inherited the institution of marriage from ancestors whose idea of marriage may be determined by the nature of the early Roman Marriage Law. Marriage was contracted without ceremonies by the consent of the parties; but added to this marriage, which itself gave the husband no power over the wife or her property, was a system of ceremonies or procedure by which both the wife and her property passed into the power (*manus*) of her husband. According to the early law, the wife passed by *manus* into the position of her husband's child. Although apparently by the time of the Law of the Twelve Tables (449 B.C.) additional ceremonies had ceased to be essential, they remained customary and only gradually grew less frequent. As the husband's power of life and death declined, the practice of divorce increased; and it might be said that divorce came to relieve women from the worst consequences of their recalcitrancy. Divorce has indeed been used through a great part of the world's history, or the history of civilized life, for the benefit of men; but its more progressive phases have been indices of the emancipation of women. This is, of course, a relatively modern movement and a mark of the greater civilizations. The currents of prehistoric 'marriage' are not easy to distinguish; but they seem to suggest that marriage, in the accepted civilized sense of the term, was a late development from a communal life wherein all the males shared all the females and reproduced the species as the common offspring of the tribe or horde.<sup>1</sup> Divorce does not begin until marriage has become a regulated institution.

The power of a husband over a wife in the earlier stages of the Roman Marriage Law was not in an uniform order of development from earlier systems. For both in Babylon and in Egypt feminine equality with men was early established. In Babylon, excepting

<sup>1</sup> *Vide* Appendix III.

the era of military expansion (when the position of women showed some intelligible decline), but both before and after it, we find women occupying a position of independence and equal rights with their husbands. In ancient Egypt this is even more pronounced than in ancient Babylon. The fact that pre-nuptial unchastity in no wise disqualified a woman from marriage argues against any conception of woman as property; and our modern rather tentative legislation for the benefit of some otherwise bastard children was anticipated in Egypt 3,500 years ago, when no illegitimate child was at a social disadvantage. 'It is the glory of Egyptian morality to have been the first to express the Dignity of Woman.'<sup>1</sup> The early emancipation of woman in Babylon and Egypt was followed by the growth of her freedom among the Jews. But there the progress of emancipation was so slow that the limitation of the husband's right to divorce his wife, and the enlargement of the wife's right to claim divorce, did not reach equality until the 11th century A.D.

The evidence of Greece points to a discrepancy between the theory and practice of sex equality. Divorce was obtainable in ancient Greece with great freedom, and in theory husbands and wives could obtain it on equal terms. But in practice this freedom remained virtually a masculine monopoly, because Greek wives were kept in a state of seclusion, not so severe as the Oriental *purdah*, but sufficient to restrict them from obtaining easily the requisite evidence or from using it effectively if they could obtain it. Here the circumstances point to a limited conception of marriage. While wives were confined to the domestic sphere, husbands found the more stimulating forms of feminine society in external relations. A type of super-courtesan of the class of *Hetairai* provided the companionship and inspiration of Athenian statesmen, whose wives were permitted to meet other men only in the presence of a member of the family or a relative. Thus the companionate element was apparent, not in marriage, but in extra-marital relations.<sup>2</sup> On these conditions the Romans effected an improvement.

The dominance of man in the early marriage laws of Rome, to

<sup>1</sup> Amélinau, *La Morale Egyptienne*, p. 194; quoted by Havelock Ellis in *Studies in the Psychology of Sex*, Vol. VI, p. 394.

<sup>2</sup> Lecky, *History of European Morals*, Vol. II, chap. v, esp. pp. 281-287. Vide also Glover, *From Pericles to Philip*, p. 345, quoting Apollo dorus.

which we have already made reference, does not suggest the early development of the companionate element which was so great an achievement of Roman society in the later days of the Empire. The earliest record of a divorce in Roman history—presumably this means the earliest record of a divorce on the ground of caprice, not of crime<sup>1</sup>—shows that the procreation of children was then recognized as a principal aim of marriage. For, while the law provided for divorce on various grounds, this case was brought on the ground of the natural sterility of the wife; and the husband, Spurius Carvilius Ruga, in spite of great affection for his wife, divorced her in order that he might marry again and furnish children for the service of the State. His action appears to have incurred general displeasure at that time, 231 B.C.; but he set an example which was followed. The ground of this divorce would perhaps on the whole enjoy the approval of a military state, and the provisions of the *Lex Papia Poppaea* in A.D. 9 seem to confirm the impression of this dominating purpose. For even if this law did not of itself indicate more than the concern of the State to secure an adequate population, it suggests that there was a firm conception of the primary purpose of marriage. But at the same time the incidental favour to married women who bore children was a step in the emancipation of the sex. For this law placed the unmarried and the childless under disabilities, and gave to women who had three children the *jus liberorum*, or exemption from the male guardianship to which otherwise women were subject at that time. The history of the Roman Law seems to show that the procreative element as the dominant factor in marriage was primitive, and that the companionate element was but slowly attained through a long struggle for women's emancipation.

The determination of the interesting question of the priority of marriage or of the family is a matter for experts in the sciences of Anthropology, Biology and Sexology rather than for the student of Law. But for the last there is no apparent doubt that the later Roman Law of Persons, and therefore necessarily of husband and wife, grew out of the institution of the family which was dominated by the authority of the *patria potestas*, or male parental power. The earliest Roman Law, in recognizing families, concentrated therefore on persons who held the *patria*

<sup>1</sup> Bryce, *op. cit.*, p. 801.

*potestas* and who were of necessity males. Sons obtained enfranchisement in consideration of their capacity for becoming heads of new families, and exercising in each case a new *patria potestas*. Since the exercise of such parental power was confined to the male sex, enfranchisement was therefore denied to women, who remained in perpetual tutelage. When the *patria potestas* was removed by the death of the male parent, females who had been under that parental authority passed under the authority of their nearest male relations. This guardianship of women is a primitive phenomenon, which is seen to enjoy relaxation, and sometimes actually to disappear, under the influence of civilization. We have noted the early emancipation of women in the civilizations of Babylon and Egypt, and with serious qualification in the case of ancient Greece. This same emancipation of women was the central feature of the germinating policy of the Roman jurisprudence in the sphere of the marriage laws. The *Lex Julia de Adulteriis* of 17 B.C. and the *Lex Papia Poppaea* of A.D. 9 both in a qualified fashion improved the status of women; and where the improvement had not been effected by statute the Roman lawyers ingeniously evaded the ancient laws in practice. The result was that by the time of Gaius, whose Institutes are dated in the late 2nd century, the guardianship of women operated only in respect of a woman's property.<sup>1</sup> Women had by that time obtained personal freedom. Moreover the provision of the *Lex Papia Poppaea* still applied to such guardianship as then existed, viz., that a freedwoman who had acquired the *jus liberorum*, i.e. had borne three children (or four in the case of a freedwoman under the patron's guardianship), was relieved of guardianship.<sup>2</sup> The equality of the sexes under the Roman theory of natural law had become a principle of the Roman jurisprudence, and the guardianship of women disappeared by the time of Justinian. The definition of Herennius Modestinus, one of the great Roman juriconsults in the 3rd century, shows the lofty view of the matrimonial union in the Roman Civil Law, and indeed it has never been excelled: '*Nuptiae sunt conjunctio maris et feminae et consortium omnis vitae, divini et humani juris communicatio.*'<sup>3</sup>

From this indication of the progressive improvement of the status of women under the law we shall turn to the modes of marriage and their corresponding evolution. The development

<sup>1</sup> Gaius, *Inst.*, I, 189, 193.

<sup>2</sup> Gaius, I, 194.

<sup>3</sup> Digest XXIII, 2, 1.

of the Roman Marriage Law is a record of simplification, wherein, as class distinctions were eliminated from the mode of marriage and the process of its completion, women's rights of divorce rose to the level of equality with men. A completely legal marriage in Roman Civil Law, carrying all the privileges of a citizen and known as *justae nuptiae*,<sup>1</sup> required that the parties should be of full age or *puberes* (males *aet.* 14, females 12), that they should intend to become husband and wife, that their fathers or heads of family, *patresfamilias*, should have given their consent, and that the parties should have the *conubium*, or capacity to contract a civil marriage.<sup>2</sup> To satisfy this last condition the parties must be Roman citizens, and must not infringe the prohibited degrees of relationship. In the absence of the *conubium*, but subject to the other conditions of a valid marriage, the marriage fell short of *justae nuptiae*, and was known as *nuptiae*, *nuptiae non justae* or *matrimonium juris gentium*. The point of the distinction is that, although *nuptiae* was a recognized union, it did not create *patria potestas*, or the power which, in the established Roman family system, a father exercised over his family. In spite of this defect, the children of such a marriage had an advantage over the children of the actually unmarried and did not require legitimation.<sup>3</sup>

To establish *manus*, i.e. the legal authority of the husband, when the marriage proper had been effected by agreement, the Romans in early times used three different forms. The marriage of patricians was completed by a ceremony peculiar to their class and known as *confarreatio*.<sup>4</sup> This consisted in the sacrifice of an ox, and the division of a wheaten cake between the spouses, who ate their respective portions in the presence of ten witnesses. The second form of civil marriage, less ceremonial than the first form, was called *coemptio*,<sup>5</sup> or marriage by purchase. The method was *per aes et libram*, i.e. copper and scales, and the process was based on the ancient form of *mancipatio*, by which power over a free man was acquired by purchase. The third form of civil marriage, noted for the absence of ceremony, was known as *usus*.<sup>6</sup> This effected a valid marriage by cohabitation for a year,

<sup>1</sup> Gaius, I, 55.

<sup>2</sup> Gaius, I, 56.

<sup>3</sup> Gaius, I, 55 & 58-64. N.B.—Given the *conubium*, the marriage was either full civil marriage (*justae nuptiae*) or no marriage at all; e.g. the marriage of *cives* within the prohibited degrees was void.

<sup>4</sup> Gaius, I, 112.

<sup>5</sup> Gaius, I, 113, 115.

<sup>6</sup> Gaius, I, 111.

but originally, according to the provisions of the XII Tables, was invalidated by the wife's absence on three nights in the year. These three forms of marriage alike established *manus*,<sup>1</sup> the authority by which a wife passed under the power of her husband and took the legal position of a daughter. As we have noted, marriage took effect by mutual agreement. The three forms, two of ceremony and one of procedure, put the wife *in manum* and gave to the husband complete legal control over her, while at the same time they did not remove her theoretical personal freedom or detract from the position of authority and respect which the Roman wife properly enjoyed.

'The Roman wife,' wrote Lord Bryce, 'in the time of the Punic Wars had, with rare exceptions, been absolutely subject to her husband. She passed out of her original family, losing her rights of inheritance in it. Her husband acquired all her property. He could control her actions. He sat as judge over her if she was accused of any offence, although custom required that a sort of council of his and her relatives should be summoned to advise him and to see fair play. He could put her to death if found guilty. He could (apparently) sell her into a condition practically equivalent to slavery, and could surrender her to a plaintiff who sued him in respect of any civil wrong she had committed, thereby ridding himself of liability. One can hardly imagine a more absolute subjection of one person to another person who was nevertheless not only free but respected and influential, as we know the wife in old Rome was. It would be difficult to understand how such a system worked did we not know that manners and public opinion restrain the exercise of legal rights.'<sup>2</sup>

Why, it may be asked, in view of the advanced position of women in early civilizations, did this institution of *manus* persist in the early Roman Law? The alternative was an equally effective guardianship on the part of the woman's *paterfamilias*. Both *tutela* and *manus* would seem to be signs of a surviving patriarchy, naturally perpetuated in the life of a military nation, and under that influence slow to disappear. Yet the Roman Law was thorough-going, and so consistent as to admit its own inconsistency where that existed. And therefore it was that the Romans came to establish the nearest approximation to matrimonial freedom and equality in history. In contrast with the old system, already dying

<sup>1</sup> Gaius, I, 108 ff.

<sup>2</sup> *Studies in History and Jurisprudence*, Vol. II, p. 790.



under the Republic, was the new practice which succeeded under the Empire.

'Under the new one, universal in the time of Domitian and Trajan, which is also the time of Tacitus, Juvenal and Martial, the Roman wife was absolutely independent of her husband, just as if she had remained unmarried. He had little or no legal power of constraint over her actions. Her property, that which came to her by gift or bequest as well as that which she earned, remained her own to all intents and for all purposes. She did not enter her husband's family, and acquired only a very limited right of intestate succession to his property.'<sup>1</sup>

Thus all the three forms gradually and indeed early fell out of use. They had begun to be superseded by a simple form even in the days of the Republic; so that, according to Sir Henry Maine, 'at the most splendid period of Roman greatness, they had almost entirely given place to a fashion of wedlock—old apparently but not hitherto considered reputable—which was founded on a modification of the lower form of civil marriage.'<sup>2</sup> The last phrase might be misleading if the use of the word 'lower' were taken to imply either of the additional forms not used by patricians. But presumably the reference is to the actual contract of marriage which had always been valid, but had customarily required completion by one of the modes of ceremony or procedure which put the wife *in manum*. This new form consisted in the delivery of the woman to the man with the *bona fide* intention of marriage but without her passing *in manum*. Thus the wife escaped the legal marital domination which under the older system accompanied *manus*; and at the same time she suffered no serious restriction by the retention of guardianship by her own family. For, as we have noted, the incidence of guardianship upon personal liberty, as distinct from property, had disappeared early in the Empire.

'Apart from *manus*, unusual in the early Empire and obsolete in the late,' writes Dr. Buckland, 'the wife did not enter the *familia*. But the husband's home was hers, and they owed each other protection and respect. Apart from *manus* she was not concerned with the cult of the *manes*, but apparently was with those of the *lares* and *penates*. The wife did not necessarily take her husband's name, though in the Empire she sometimes did. She shared the honorific titles of her husband. Their properties remained distinct, and gifts between them were void.'<sup>3</sup>

<sup>1</sup> Bryce, *loc. cit.*

<sup>2</sup> *Ancient Law* (Routledge), p. 128.

<sup>3</sup> *A Text-Book of Roman Law*, p. 106.

Such being the conditions and the modes of marriage under the Civil Law of ancient Rome, it remains to enquire into the corresponding conditions of divorce under the same law. It might seem that divorce was easier than marriage. Sir Henry Maine described the Roman marriage tie as 'the laxest the Western world had seen';<sup>1</sup> and it is the case that mutual consent was at all times the sufficient condition of divorce<sup>2</sup> until Justinian reduced its exercise to three grounds. The same Emperor added penalties for divorce by mutual consent in the form of forfeiture of property and confinement in a convent. But from early times divorce was obtainable also by one party without the consent of the other,<sup>3</sup> subject to a feminine disqualification when the wife was *in manu*; and this could be effected without any specific form, except that a marriage established by *confarreatio* was dissoluble by the inversion of the process known as *diffareatio*. A change was made by the *Lex Julia de Adulteriis* of 17 B.C., which required that the *repudium*, or divorce of one party without mutual consent, should be formal: thus, in order to obtain such divorce, he must deliver a *libellus repudii* in the presence of seven Roman citizens of marriageable age; after which the marriage was cancelled and the divorce registered.

These facilities for divorce were subject to certain restrictions both in the earlier stages of Roman legal history and afterwards under the enactments of the Christian Emperors. Thus the privilege of divorcing a husband was denied to a wife *in manu*. Therefore wives who were married by *confarreatio*, *coemptio* and *usus* could never divorce their husbands, although mutual consent was open to married persons at all times until the Christian Empire. But if they were divorced by their husbands they could insist on being released from *manus*. The restrictions, which were intermittently imposed after the Empire became officially Christian, will be noted later.

The decline of the old accompaniments of marriage allowed the woman to enter into matrimonial union without the subjection expressed in *manus*. Under the new 'fashion of wedlock,' wherein a wife no longer passed *in manum*, the restraint upon wives was relaxed. Divorce then operated both by mutual consent and by the desire of the wife, equally with the desire of the husband,

<sup>1</sup> *Op. cit.*, p. 129.

<sup>3</sup> By *Libellus repudii*.

<sup>2</sup> I.e. *Divortium communi consensu*.

when the other party was not consenting. Yet for a considerable period while a wife had ceased to pass *in manum*, she remained under the *patria potestas*, or the power of her father,<sup>1</sup> by whose consent alone she could be married and who could recall his daughter against the wishes of both herself and her husband. This right had become very nominal, and was denied by Antoninus Pius in the 2nd century A.D.; but the restriction was qualified by Marcus Aurelius, who succeeded him in 161 and allowed a father to exercise such authority only for very weighty reasons. Under the Roman Civil Law, between the decline of the old modes of marriage—a process difficult to fix by date, but some time during the two centuries before the Empire, and not unfitly indicated by the birth of Cicero in 106 B.C.—and the reforms of the Christian Emperors, which had expression in the severe provisions of Justinian in the 6th century A.D., there was a protracted intermediate stage. These intermediate centuries, which reached their height in the age of the Antonines, were the era of feminine emancipation, and established the highest historical approximation to sexual equality and matrimonial freedom.

<sup>1</sup> Properly the *paterfamilias* who might not actually be the father.

## CHAPTER II

### THE CONTRIBUTION OF CHRISTIANITY

The development of Marriage and Divorce in the Roman Empire indicates the point at which we should consider the bearing of the New Testament upon both the institution of marriage and the liberty of divorce. The successful establishment of divorce by mutual consent, and the later equality of women with men on all grounds, is to be set against the ecclesiastical principle of the indissolubility of marriage which the Church derived from the New Testament and the Canon Law established. The flexibility of interpretation which has attached to the pronouncements in the Gospels amply warranted the conclusion of Gibbon when he wrote of 'the ambiguous word which contains the precept of Christ'; but this is not countenanced by those theologians who contend that in the sayings on Marriage and Divorce the Founder of Christianity departed from His general practice of enunciating principles, and definitely legislated for the Christian society.<sup>1</sup> It is, of course, too easy for the literalist to take the words of the Gospel at their face value and apply them to modern conditions in the fashion of binding statutes. But it is not to be suggested that all those who take the legislative view of the dominical pronouncements on divorce are among the literalists. For the conclusion, as well of good scholars who hold that view as of those who deny the character of legislation to the judgements of Jesus, takes account of the conditions wherein the words were spoken. But whereas the practice of the first is to treat the pronouncements on marriage and divorce as being as it were in a compartment unconnected with the other sayings which are attributed to Jesus in the Gospels, those who conclude that these sayings are not legislation, but statements of an ideal, corrective of contemporary standards and practice, reach their conclusion by a reference to the temper of the Gospels as a whole. Just as certain episodes are ruled out on the reasonable count that they are not 'Christ-like,' so certain sayings cannot be invested with statutory value, because their application by a rigid uniformity

<sup>1</sup> Dr. Gore is an outstanding example of this position; *vide* Royal Commission on Divorce, etc., Minutes of Evidence, Vol. II, Q. 21,548 ff.

would so frequently be found to violate the recognizable and recognized standards of Christian charity. The sayings on Marriage and Divorce, if accepted literally, would seem to establish the rule of indissoluble marriage, which through all history, in spite of persistent ecclesiastical efforts to secure it, 'neither our fathers nor we were able to bear.' But, in the light of the conditions in which the pronouncements were made, it may be urged that, while no rules of indissolubility of marriage can be deduced, the assertion of the ideal of unbroken union is unequivocal.

In this matter of marriage and divorce there are some who hold the secularist opinion that legislation should proceed according to expediency, uninfluenced by historical Christianity. But in this country, which is professedly Christian and officially expresses its Christianity in an Established Church (which is the partner of the State) this proposed short cut is impracticable. Were it otherwise, and the Church had no official status, the Christian conscience, which is often the most assertive where it is the least informed, would not fail to create a cleavage between social progress and ecclesiastical principle. But, while we cannot dismiss the words of the Gospel as entirely irrelevant, we must understand them in their own setting. It may then be found that the Church has read into these words both more and less than they mean; that it has built upon them a system which is more than they will rightly bear, and has failed to proclaim the ideal which is one with the Spirit of Christ. It is important, then, that those who feel that the present law is defective in justice and charity towards many of the victims of matrimonial misfortune should show that their convictions are in true accord with the spirit of Christ's Religion, and that Christ's Religion does not warrant the legislative measures of the historic Church. The Christian conscience is not always truly Christian, but a product of past influences; and in this matter of marriage and divorce these influences lie in the centuries of ecclesiastical control. The Canon Law established the principle of the indissolubility of marriage on the basis of a literal reading of the texts of the New Testament, and although it elaborated provisions for making marriages null and void on a variety of grounds, this device involved no technical violation of the principle of indissolubility. This principle rests on the theory of legislation, by which the relevant pronouncements are accepted as carrying a statutory value in all times,

countries and conditions. But if we are to hold this view, how are we to account for the fact that the sayings, thus interpreted as legislation, had so limited a reference and left so many contingencies untreated?

It is everywhere agreed among scholars that the Gospel according to St. Mark is our earliest Gospel. It forms, in conjunction with the document called Q, which is chiefly composed of sayings of Jesus, the basis of the other two historical Gospels which bear the names of Matthew and Luke. These three are known as the Synoptic Gospels, and among them yield four references to marriage and divorce from the lips of the Lord. The first is in Mark x. 11, 12:

(1) 'Whoever shall put away his wife and marry another, committeth adultery against her; and if she herself shall put away her husband, and marry another, she committeth adultery.'

The second is in Luke xvi. 18:

(2) 'Every one that putteth away his wife and marrieth another, committeth adultery: and he that marrieth one that is put away from a husband committeth adultery.'

The third and fourth are in Matt. v. 31, 32, and xix. 3-9 (esp. verse 9):

(3) 'It was said also, Whosoever shall put away his wife, let him give her a writing of divorcement: but I say unto you, that every one that putteth away his wife, saving for the cause of fornication, maketh her an adulteress: and whosoever shall marry her when she is put away committeth adultery.'

(4) (verse 9 only) 'And I say unto you, Whosoever shall put away his wife, except for fornication, and shall marry another, committeth adultery: and he that marrieth her when she is put away committeth adultery.'

It will be noted that none of these pronouncements is in complete agreement with any other. The versions in Mark and Luke are in practical agreement up to the colon point, viz. that a man who divorces his wife and marries another commits adultery. But the concluding clauses vary: Mark takes the case of a wife who divorces a husband and marries another, and convicts her of adultery; Luke attributes adultery to a man who marries the divorced wife of another. Both of the examples in Matthew differ from Mark and Luke in the inclusion of the important excepting cause of fornication, to which we shall shortly have to refer. But

apart from this signal difference the first example from Matthew differs from the other three in its first clauses, in that the action of the divorcing husband makes the divorced wife an adulteress; whereas Mark, Luke and the second example from Matthew are agreed in attributing adultery to the divorcing husband.

These discrepancies do not necessarily cause the pronouncements to cancel one another out. Indeed it could be maintained that they strengthen the case against divorce by extending the area of condemnation. But the true purport of these dominical sayings is to be reached by reference to the conditions to which they originally applied.

The Jewish law of divorce at that time appears to have been in its broad principles not unlike the contemporary Roman Law, or at any rate not unlike the Roman Law wherever the old methods of marriage survived. For as we have seen, *confarreatio*, *coemptio* and *usus* were not superseded at a stroke, and, since they had the effect of putting the wife *in manum*, they disallowed divorce by a wife. The new fashion of marriage, which gradually eliminated the old methods, established equality. In that respect the Roman Law went far ahead of the Jewish; for the extension of female rights to the point of equality was not established among the Jews until the 11th century A.D. The rights of a husband in Jewish Law appear to have tallied in principle with those in Roman Law; but a wife could obtain a divorce only at the instance of her husband. He could give her a writing of divorcement and send her away; but her right was limited to her powers of persuasion<sup>1</sup> in prevailing upon him to take such action. Among the Arabs a wife could take the initiative by making herself so objectionable that her husband would divorce her. This course obviously would be open also to a Jewish wife. But whether the practice of a wife requesting her husband to divorce her on consideration of the return of the *mohar*, or purchase money, was known among the Jews, as among the Arabs, appears to be uncertain. According to Josephus, the action of Salome, the daughter of Herod Antipater and sister of Herod the Great, in sending a bill of divorcement to her husband was disapproved as an indecent innovation of foreign origin.<sup>2</sup>

The general principle of divorce by a husband was not in

<sup>1</sup> Or pressure through a Court, the Beth Din.

<sup>2</sup> *Antiquities*, XV, 7, 10.

question; but the extent and variety of the grounds of such divorce was debated by two Jewish Schools of Rabbis. The School of Rabbi Hillel would allow divorce on the ground of any offence against the caprice of a husband, e.g. if he had cause of complaint against her on account of faulty cooking.<sup>1</sup> But the School of Rabbi Shammai adopted a more severe standard, and limited the ground to adultery or whatever is rightly to be included under the term among the Jews of that time. Of the four passages recently quoted two carry an implied reference to this Rabbinic dispute. The introductory matter in Mark x. 2 ff. is found in Matt. xix. 3 ff. with certain differences, and in a version which is perhaps explanatory. The other passages occur each in a different setting: Matt. v. 31, 32 falls in that collection of discourses which is called the Sermon on the Mount, and Luke xvi. 18 has no sexual or matrimonial context. But in these two generally corresponding examples the dominical pronouncements follow questions put by the Pharisees. Mark naturally invites attention first. The Pharisees are reported as asking the question in its unqualified form, 'Is it lawful for a man to put away his wife?' And, as was not seldom his wont, Jesus threw them back upon their own law, which they forthwith recited.<sup>2</sup> (It was then attributed to Moses, although Deuteronomy dates from not earlier than the prophetic period beginning in the 8th century; and the bulk of it is commonly identified with the Book of the Law which was discovered in 622 B.C.)<sup>3</sup> This law permitted a husband to divorce an unpleasing wife, and the wife to marry another husband. To this citation from the Deuteronomic Law Jesus replied with an authoritative statement of the ideal of a sound marriage, or, as it might be put, of marriage according to God's purpose. He went back to such original sources as were available, that is to say, to the early Jewish scriptures which contained what was known erroneously as the Law of Moses; and, as Wellhausen<sup>4</sup> interprets the method, He refuted one original authority with another, Moses with Moses, the apparent ease of divorce in Deut. xxiv. 1-4 with the terms of irrefragable union in Gen. ii. 24. According to various views and calculations, these two authorities would have been parted in date of composi-

<sup>1</sup> Cf. divorce in Egypt, of which an illustration is given by Mr. Robert Graves in one of the War Books, *Good-bye To All That*, p. 416. *Vide* also p. 68 n.

<sup>2</sup> Deut. xxiv. 1-4.

<sup>3</sup> 2 Kings xxii. 8.

<sup>4</sup> *Vide* Peake, p. 693.



tion only by something under 100 to something over 200 years, the Genesis text coming from the Yahwistic writer (J) early in the 8th century B.C. Neither authority was therefore very ancient, but, while Genesis is quoted as a primary authority, Deuteronomy represented in fact a more advanced stage of development. Indeed the Deuteronomic legislation, so far from loosening ancient bonds of marriage, actually imposed certain restrictions upon the inherited liberty of divorce; but that these restrictions were not in fact very effective may be concluded from the admitted laxity of the School of Hillel. When therefore the Founder of Christianity quoted Genesis, He was adopting the customary current estimate of its authority; and there He found an ancient statement, in J's account of the Creation, which served to answer His enquirers, 'They shall be one flesh.' Of course they could not literally be 'one flesh'; but the terms convey the most emphatic indication of undivided union. 'What therefore God hath joined together, let not man put asunder.' The ideal marriage, which has the sanction of eternal righteousness, is thus described as 'joined together' by God. But if the marriage is not ideal, but a bundle of imperfections and obvious mistakes and miscalculations from the first, lovelessness degenerating into deadly hatred, to say that the parties to such a marriage are 'joined together' by God becomes a mockery, a perversion, and a lie. To understand the Christian ideal, experience must be brought to bear upon the text. The disciples not infrequently in the Gospels were slow to understand their Master; and here (in the Markan Version) they are reported to have asked Him, as it were, to be more explicit. And for answer the writer gives the pronouncement which the Church of history has read as the charter of indissoluble marriage:

'Whosoever shall put away his wife and marry another, committeth adultery against her: and if she herself shall put away her husband, and marry another, she committeth adultery.'

This pronouncement, if taken at its face value, and accepted as actual legislation for the Church of all time, could mean only a prohibition of divorce, as divorce has been understood in history, i.e. divorce with the right to marry again. Separation without the right of re-marriage could be deduced (i.e. divorce *a mensa et thoro*, but not divorce *a vinculo*). But this deduction is arbitrary. It interprets the pronouncement apart from its full context and

apart from the tone and temper of the whole Gospel. Moreover, this interpretation is by no means supported by a consensus of New Testament scholarship. In the conditions of early but one-sided divorce which we have remarked among the Jews on the authority of their law, hardly restricted save by such monetary considerations as in Roman Law would have been called the restoration of *dos*, it is intelligible that the Founder of Christianity should set a high standard to correct the current laxity; but it was not in accord with the method of His teaching, even where this was the most severe, to lay down hard and fast rules admitting of no exception. His practice was to provide large principles of recognizable truth to be interpreted and applied not in the letter, but in the spirit. This is one possible explanation of this pronouncement in Mark. And the second part of it might still seem to require further elucidation, because, as it stands, it would have no bearing on current practice among the Jews. When wives had no legal right of divorce, there would seem to be no point in saying that if they divorced their husbands and married others they would be guilty of adultery. It is possible that the reference might be to wives who had prevailed upon their husbands to divorce them—a kind of collusion in which the wife took the initiative, but was not necessarily guilty of adultery in deed. In such cases, of course, wives would be likely to marry again, because the Jews commonly disapproved the celibate state and encouraged re-marriage: so much so that if a man died without having any sons (not children of either sex, as afterwards misunderstood by the Jews or misreported in the Gospel, Matthew xxii. 24), it was accounted by the Deuteronomic Law<sup>1</sup> to be the duty of his brother to marry the widow, the first son of this marriage being regarded as the son of the deceased man, in order that his name should not be blotted out. But apart from this intelligible practice, the conditions of divorce by husbands were admittedly lax, and there was room for a rational protest against a low ideal at the root of the conception of marriage. Furthermore, it was in accord with the principles and the teaching of Jesus to exalt the status of women, and therefore to establish an equality of responsibility between the sexes. This, however, is an uncertain solution of our problem, because we do not know that Jesus was in fact referring to wives who had pressed their husbands to

<sup>1</sup> Deut. xxv. 5-10.

divorce them; whereas we do know that the Jewish Law made no provision for wives to divorce their husbands.

On this ground this pronouncement in Mark has provided a field of debate among scholars. Dr. Schmiedel holds that the pronouncement is based on Roman Law,<sup>1</sup> where, as we know, after the decline of the old ceremonial accompaniments of marriage, wives could divorce their husbands. The apparent irrelevance of the pronouncement to Jewish Law, together with its appropriateness to the conditions of marriage and divorce in Rome, has led to the view that Mark added it to the words of Jesus for the benefit of Roman readers. Dr. Charles concludes this possibility in his emphatic view that the words are not dominical, when he writes:

'In x. 12 Mark speaks of a woman divorcing her husband. But such a statement is unhistorical, and would have been incomprehensible to a Jew. The law allowed no Jewish woman to divorce her husband, and this right was not accorded to her for a thousand years later. This unwarrantable change introduced into the text by Mark may be due to the fact that he wrote his Gospel in Rome and wished to give the words a wider application; for Roman women could divorce their husbands. But there is a further objection to this statement. It forms an intolerable anticlimax. If a husband were forbidden to divorce his wife on certain grounds, it was wholly unnecessary to add that a wife was likewise forbidden to divorce her husband on similar grounds, seeing that by the law she never had the right to divorce her husband at all. Our Lord does not indulge in such inconsequential absurdities.'<sup>2</sup>

Dr. Major expresses his agreement with Dr. Charles on the point of the words being unhistorical and being due to the prevalent practice in Rome where the Christian conscience condemned it, and adds a further reason:

'A critical study of the Synoptic Gospels has led me to view all examples in them of private explanatory and supplementary teaching attributed to Jesus as belonging to secondary sources of very little historical value, and so as not constituting a part of the primary Gospel. It was a very natural device to try and give authority to such teaching by asserting that it was said by Christ afterwards in private to the disciples in explanation of, or in order to supplement, something said by him in public.'<sup>3</sup>

<sup>1</sup> *Encyclopaedia Biblica*, col. 1851.

<sup>2</sup> *The Teaching of the New Testament on Divorce*, pp. 27-29.

<sup>3</sup> *Modern Churchman*, 1930, Vol. XX, pp. 333-334.—N.B. In his great work *The Four Gospels*, p. 178, Dr. Streeter writes of the 'pith' of the divorce dis-

On the other hand Dr. Box maintains the authenticity of the Markan pronouncement.<sup>1</sup> He holds that Dr. Charles's exegesis is arbitrary, and imports an argument of Dr. Burkitt's to suggest that, although the words of the Markan pronouncement were irrelevant to Jewish practice, they actually applied to a certain familiar case, which was itself a violation of Jewish Law.

'I venture to think such a view mistaken' (i.e. that the pronouncement in Mark x. 12, condemning the woman, is a secondary addition based on Roman Law), writes Dr. Burkitt, 'and that so far from being a secondary addition, it is one of the really primitive features of the Gospel of Mark, a feature which was dropped out or altered when its historical meaning had been forgotten. It was no doubt monstrous to imagine that a Jewess should desert her husband to marry another man, but it was not quite unheard of. We know the woman and her history. Herodias had left her husband—the man whom Mark calls "Philip," but Josephus only knew as "Herod"—in order to live with Antipas. Antipas was also guilty: he had put away the daughter of the Arabian King Aretas to marry Herodias, his half-brother's wife, she herself being his half-sister.

'We need scarcely pause to enquire whether Herodias merely deserted her first husband, or whether, like her great-aunt Salome, she availed herself of the methods of Roman procedure and divorced him. Our Lord's previous words show that He did not regard an "immoral" act as being any the less "immoral" for being carried out according to law: in either case I venture to think the saying as reported in Mark clearly implies a reference to Herodias, a reference which is singularly appropriate in the time and place.'<sup>2</sup>

The highest regard for the scholarship of Dr. Burkitt does not allow us to accept without question the facile conclusion of Dr. Box that 'we may, therefore, in spite of Dr. Charles, rely with confidence upon the Markan record.' For Dr. Burkitt's importation of Herodias is, after all, conjectural; and granted that the pronouncement of Jesus did refer to Herodias, it would by no means follow that it was to be taken as a sweeping statutory judgement on all cases of divorce by a wife for all time. The prejudice against Herodias seems to have been aggravated by the consequential execution of John the Baptist, which brought it home forcibly to Christian minds. But even so it is not clear that Herodias was recognized at the time of Jesus as the cause

course in Mark as lying in the last two verses; but that does not necessarily establish dominical authenticity or deny the deductive and editorial activities of the early Church.

<sup>1</sup> *Divorce in the Old Testament*, pp. 37-38.

<sup>2</sup> *The Gospel History and its Transmission*, p. 100 f.

of John's execution; and it remains a question how far personal grievance combined with political prejudice against John to cause his execution. Since, moreover, Herod Antipas brought his wife Herodias from Rome, it is not certain that the circumstances of his marriage would have been known in Palestine, although they might easily be known by Mark, who wrote in Rome, and thus find their way into the Synoptic tradition, for they are recorded by Josephus, who wrote considerably later. It appears from Josephus<sup>1</sup> that Herod Antipas agreed with Herodias to divorce his wife, the daughter of Aretas, King of Arabia, not in deference to Jewish Law—for there was no prohibition of more than one wife—but because Herodias could not brook a rival. In the event this first wife effected an escape and returned to her father in anticipation of Herod's intentions, and proved thereby to be the cause of future hostilities. Dr. Burkitt regards it as irrelevant whether Herodias deserted her husband Herod (as in Josephus) Philip (as in Mark), or divorced him. Josephus appears to regard it as a desertion,<sup>2</sup> in which case Herodias would have had two husbands unless and until Herod Philip divorced her, and would have brought herself under censure on that count. If Herodias had divorced her husband under Roman Law, or if her husband had divorced her, this presumably would have had the effect of a judgement *in rem*, determining her status as an unmarried woman with ubiquitous validity. But under Jewish Law there would still be an objection to her marriage with Antipas on the ground of the Levitical impediment. Again, under the Roman Law, Antipas and Herodias would appear to have been within the prohibited degrees. If, as Dr. Burkitt says, they were half-brother and half-sister, they could not lawfully marry,<sup>3</sup> although in Roman Law there was no bar to the marriage of step-brother and sister, and not until the reign of Constantine was there a bar to that of brother and sister-in-law. But, *pace* Dr. Burkitt, this does not appear to have been the relationship of Antipas and Herodias. Antipas was the son of Herod the Great by his wife Malthace. Herodias was the daughter of Aristobulus (son of Herod the Great by Mariamne) and Bernice, the daughter of Salome, Herod the Great's sister. Therefore Herodias was the granddaughter of Herod the Great and half-niece of Antipas. Being thus relations of the half-blood, one of them being removed

<sup>1</sup> *Ant.*, XVIII, 5, 1.<sup>2</sup> *Ant.*, XVIII, 5, 4.<sup>3</sup> *Gaius, Inst.*, I, 60, 61.

only one degree from the common ancestor, their marriage would have been void by Roman Law.<sup>1</sup>

This excursus into the relationship of the parties under Roman Law raises only a remote issue. But it appears that under either Jewish or Roman Law the marriage of Antipas and Herodias was illegal. It would on that account merit the reproof which it received in Mark; and if the dominical pronouncement were, as Dr. Burkitt suggests, a direct reference to it, this would be intelligible as a condemnation of admitted lawlessness. But it is difficult to say that such a pronouncement on the part of Jesus, if indeed it were made by Him and not by an evangelistic editor, would be more than a kind of *obiter dictum* about a current case which was quite unrepresentative and, apart from Salome's Roman divorce of her husband, already noted *supra*, otherwise unheard of among the Jews. Those who hold the legislative theory of the Lord's alleged pronouncements must reckon with the fact that legislation prohibiting what is already illegal is superfluous. But the conditions of Marriage and Divorce under the Roman Law, the merits of which were doubtless but little understood or appreciated by the Christian converts in Rome, readily explain the words in Mark as a well-intentioned application of dominical principle to pagan conditions.<sup>2</sup>

When, in the first Gospel, Jesus had made the pronouncement of indissolubility (excepting the ground of adultery or unchastity), Matthew reports an exclamation of surprise on the part of the disciples, 'If the case of the man is so with his wife, it is not expedient to marry.' The prospect of marriage with so small an opportunity of escape from an incompatible union was totally foreign to their inherited ideas. The Master's words, as Matthew gives them, would come as a hard saying to the Hillelite; but

<sup>1</sup> Gaius, I, 60, 61.

<sup>2</sup> Since the case of Herodias has been imported to account for the Markan pronouncement, something more may briefly be said at this point about the long-enduring impression of the wickedness of Antipas and Herodias. In spite of its illegality, this marriage of Herodias ought not to be dismissed as an example of unconsidering sexual vice or of merely calculating ambition towards social advancement. Herodias's choice of Antipas is rightly to be attributed to genuine affection; for when in later years she had goaded her then peace-loving husband to visit the Emperor to solicit his favour in the settlement of a question of succession, and as a result Antipas suffered exile in Gaul, Herodias chose to accompany him and to share his fate rather than remain to enjoy life in Rome or elsewhere.

may rightly be taken as a correction of a fundamentally unsound attitude to the union of the sexes in a state where love, not law, is the properly dominating factor. We have noted how the pronouncement of indissolubility in Mark may have been prompted, or at least edited, as a result of contact with actual conditions in Rome. It is not improbable also that Matthew's version may have been shaped by the actual conditions of marriage in the Christian Society at the time of the composition of the Gospel, and that it was at once a protest against laxity and a concession to prevailing practice. It is a question, moreover, how far the Christian reaction against laxity, and even against marriage itself, was due to the eschatological illusion. The prospect of the coming emergence of the existing order into the new kingdom of heaven, which so greatly occupied the Christian mind in the first century and so strongly coloured the language of the first Gospel, concentrated the thought of early Christianity upon the immediate relief which the Second Advent promised. As in other worldly relations, so in the matter of marriage, this prospect may have facilitated a revulsion against sexual interests to an extent far removed from the ideal or approval of the Founder. But it will be noticed that this alleged pronouncement of Jesus, condemning divorce on the part of either the husband or the wife, offers, as it stands, no solution of the problem which is presented by actual matrimonial calamity. It indicates the ideal marriage, life-long, indissoluble, because this is based on mutual love. But the Founder of Christianity is not shown to have offered any practical directions for the remedy of a marriage which has actually broken down. The attitude of *non possumus* is the familiar policy of those Churchmen who say that death is the only relief which the Christian Church can allow; but it is not like the Jesus of the Gospels to treat human suffering with this altogether brutal lack of sympathy. If He were legislating, as Churchmen maintain, why then did He fail to legislate save in the negative?

On the comparison between Mark and Matthew it will be proper to press a further point. In Mark, as we have noted, the Pharisees are reported as asking if it is lawful to put away a wife. The question in the circumstances of the time would be meaningless except as an entanglement, because on any interpretation of the law the divorce of a wife was lawful on some grounds. The debate between the Schools of Hillel and Shammai con-

cerned the extent of such grounds. The School of Hillel left the extent practically unlimited. Therefore the version of the Pharisees' question in Matthew is the more intelligible in the circumstances: 'Is it lawful for a man to put away his wife for *every cause?*' The School of Hillel said 'Yes'; but the answer of the School of Shammai was to interpret Deut. xxiv. 1-4, more narrowly, to allow only sexual offences as grounds for legal divorce. Jesus, referring, as in Mark, to origins, both rejected the laxity of Hillel and raised the issue upon an ideal plane far above the microscopic inspections of Deuteronomy by the School of Shammai.

Mark is the historical foundation of Matthew and Luke. Matthew and Luke each contain portions peculiar to each; but a large part of each of these Synoptic Gospels is common to both, but not found in Mark; and this common matter is traceable to the lost document, a body of tradition, called 'Q.' 'Q' consists of sayings of the Lord, of which Mark records but comparatively few; and it is not unlikely that these owed themselves largely to Matthew the Publican, whose name was given to the later Gospel, which was probably compiled at Antioch from Matthew's collection of the Lord's sayings and Mark's history of the Founder (which had been written to meet the demand of the early Roman Christians). In Matthew we have seen two separate examples of dominical pronouncements on Marriage and Divorce. The later one in chap. xix. 3-9 corresponds in the introductory matter with our citation from Mark. The earlier, in chap. v. 31-32, stands independently in the collection of sayings called the Sermon on the Mount. But both of these have a common distinction from the prohibitive form in Mark, and the unconnected and isolated pronouncement in Luke. This lies in the famous exception which has been held, even on the legislative theory, to permit divorce for adultery.

(Chap. v. 32) ' . . . I say unto you, that every one that putteth away his wife, *saving for the cause of fornication*, maketh her an adulteress: and whosoever shall marry her when she is put away committeth adultery.' (Chap. xix. 9) ' . . . I say unto you, Whosoever shall put away his wife, *except for fornication*, and shall marry another, committeth adultery: and he that marrieth her when she is put away committeth adultery.'

In their little book, *Divorce in the New Testament*, written against the opinions of Dr. Charles, both Dr. Gore and Dr. Box hold



that the excepting clause in Matthew is late and editorial; but beyond that they do not appear to be quite agreed. For Dr. Gore admits that the effect of the clause is to allow the dissolution of a marriage and the re-marriage of the innocent husband, but Dr. Box refers to the earliest commentators, who in his opinion did not understand the excepting clause to authorize more than separation without re-marriage.<sup>1</sup> On an earlier page he had written, 'Divorce for proved adultery, and re-marriage of the innocent husband, is thus allowed in the text of these passages, though not, as we hold, with the authority of Christ.'<sup>2</sup> Others, such as Dr. Sanday in his evidence before the Royal Commission, have been of the opinion that even if the excepting clauses were not in the original pronouncement they did nevertheless express the Lord's intention.<sup>3</sup> In any event, if the words were a late insertion, they must have been inserted for a reason in which the early Church concurred. Human nature would not bear the rigorous rule of indissolubility, and the whole spirit of the Gospel, which reflects the dominical principle of accepting human institutions and making them work as well as possible, is against an impracticable law. A recent pronouncement by a modern Bishop on the vexed question of the re-marriage of divorced persons in Church—which is allowed and indeed on all save one count actually enjoined by the Law,<sup>4</sup> but commonly refused by the Church—is apposite at this point. Dr. Whittingham, Bishop of St. Edmundsbury and Ipswich, refused to intervene in a case of re-marriage in Church under the terms of the Act, and made a full statement on the issues, giving his considered reasons for regarding the Law of the Realm as being on this point sound. In the course of his enquiry into the testimony of the Gospels he deals with the excepting clauses in Matthew and writes:

'This exception occurs in the two passages in that Gospel, one in the Sermon on the Mount and the other in the 19th chapter, where the statement is in answer to the question of the Pharisees, "Is it lawful for a man to put away his wife *for every cause*?" To understand our Lord's teaching we must try to understand the circumstances to which it was addressed. Among those circumstances was the recognition of divorce as legitimate, and on several grounds. The question of the

<sup>1</sup> Pp. 46-47.

<sup>2</sup> P. 39.

<sup>3</sup> *Royal Commission Evidence*, Vol. III., Q. 38, 501 ff., and Q. 38, 662 ff.

<sup>4</sup> M.C. Act, 1857 (20 & 21 Vict. c. 85), ss. 57 & 58; re-enacted in Judicature (Consolidation) Act, 1925, 15 & 16 Geo. V, s. 184 (2) & (3).

extent of those grounds was evidently exercising the minds of men, and it was in view of this attitude that the Pharisees put their question. The answer, which apparently rejects other causes, allows that of adultery.

This qualification by St. Matthew clears up what may seem to be otherwise a rather curious way of putting the matter in the other Gospels. What is the precise force of the expression that if a man marries he makes his divorced wife an adulteress when by the statement of the case she is one already? This is not a strained criticism: it is pertinent. I feel sure it is only familiarity with the phrase that prevents the awkwardness of it in such an application being realized. It doesn't really fit the circumstances of adultery, whereas it does most aptly apply to the general conditions governing "putting away" among the Jews at the time with adultery left out. The exception makes the precise form of words clear and appropriate. We have not then to interpret St. Matthew's words by those of St. Mark and St. Luke, but find the necessary qualification of these last two Gospels in St. Matthew.<sup>1</sup>

There is much else in the Bishop's admirable statement which is valuable for Church policy, but for the moment the above quotation is sufficient. Yet it is urged by the party of indissolubility and rigorism that, even if the excepting clauses be admitted, they do not permit the re-marriage of the separated parties. It is on this principle that the historic Church has legislated. The principles of the Canon Law (which in practice allowed generous exceptions in the case of husbands, although, of course, on terms) confined divorce to that variety known as divorce *a mensa et thoro*. This gave birth to the spurious and diseased infant of the English Law, the judicial separation, which, on the testimony of all who have had experience of the Courts and of social service work, has been productive not only of great hardship but also of considerable sexual irregularity. Once again this contracted interpretation rests on the theory of dominical legislation. It makes no allowance either for the Lord's practice of enunciating principles or for the circumstances wherein the words were spoken. One would think that some of our theologians, when bent on buttressing an ecclesiastical tradition, were lawyers interpreting statutes; whereas in fact the materials are totally different, and the precision proper to the lawyer is insupportable in the case of the theologian, who has to deal not with the clauses of a statute book but with the sayings of an Idealist. Our Lord was dealing with conditions in which divorce was easy, and re-marriage the common corollary, because a state of celibacy was repugnant to

<sup>1</sup> *Modern Churchman*, March 1930, p. 679.

the Jew. As in all history, except when the Canon Law was successful in enforcing its rules, so in the first century in Palestine divorce meant the right of re-marriage. Otherwise it would not have been divorce. Granted the ideal marriage, there would be no divorce; but granted the divorce, that is an end to the marriage, and if the marriage is ended, then, in the nature of the case, there can be no bar to a new marriage. Christ's Religion sets a high ideal; it has no place for life lived on a low level of easy virtue. Yet at the same time Christ's Religion faces facts; it does not impose the yoke of gratuitous cruelty, and it makes men the masters, not the slaves, of human institutions. Marriage was made for man, not man for marriage.

In so far, then, as the teaching of Jesus can fairly be estimated otherwise than on impossible theories of legislation, the prohibition of divorce, as divorce is understood, i.e. carrying the right of re-marriage, is not more emphatic than that of separation without re-marriage. There is an ideal of marriage in which love will not offend; and divorce, or the ground of divorce, will not occur. But if love defaults, and the ground of divorce arises, none can insist that those whose love has turned to hatred shall either continue to live together or be denied the development of their lives in a true psychical and physical union. Jesus, in stating the ideal, did not exclude the possibility of failures; and the whole tenor of His teaching was to help the failures to recovery.

It might be urged that, in the light of current Jewish practice, the Founder of Christianity was less establishing a statutory rule of indissolubility of marriage than impressing the principle that marriage ought not to be dissolved; that He would disallow the attitude which regards marriage as an adventure to be abandoned if it were found to be unsuccessful, and would set up the ideal that a marriage seriously undertaken and forged in love would find separation impossible to contemplate. But if any separation of the married parties is permissible in the Christian scheme of life (e.g. the divorce *a mensa et thoro* of the Canon Law), can it be said that the effect is dominically prescribed and limited to separation without re-marriage? To quote again the Bishop of St. Edmundsbury and Ipswich:

'I find therefore nothing in divorce for adultery which is irreconcilable with Christian principles or contradictory of our Lord's teaching. Divorce seems to me to be the same thing in its result as the annulment

of a marriage and to carry of necessity the right to marry again. If a marriage is annulled there can be no barrier to a subsequent marriage. The two things, divorce and re-marriage, go together in our Lord's teaching, and whatever qualification the words given by St. Matthew and the general character of the teaching imply in respect of divorce apply equally to re-marriage.<sup>1</sup>

It is especially gratifying that an English Bishop should use his authority to press this conclusion. But there still remains a point to be settled. Dr. Whittingham writes of divorce for adultery. Such was the ground to which the School of Shammai sought to limit divorce among the Jews. Such was the ground which figured in the excepting clauses in Matthew's version of the teaching of Jesus. Such has been the ground which the Christian Church has recognized with greater or less elasticity. Such is the ground which governs the English Law both as enacted in 1857 and by the amending Act of 1923, which dispenses wives from proving desertion or cruelty in addition to adultery, and thus equalizes the sexes in matrimonial causes. According to our English definition, adultery is voluntary sexual intercourse between a married person and a person of the opposite sex other than the one to whom such person is married. But the question arises whether or not the offence, which appears in the excepting clause in our English versions of the New Testament, was actually so limited. This question has tried the resources of great scholars, and even if a precise and categorical answer is impossible, there is yet good evidence that the ground was more elastic than is the definition of adultery in English Law. Fornication, of course, has commonly a pre-marital element. It implies sexual connection at least with a woman who is unmarried, and is sometimes understood to require that both parties shall be unmarried. But there have been examples of both Roman and Anglican divines who have sought to contract the sense of the word as used in the Gospel to pre-marital unchastity, thus most absurdly rendering divorce easier for fornication than for adultery. The two words occur in the text, and may be virtually identical in sense. The Greek word *πορνεία*, translated 'fornication,' is what Gibbon described as being 'flexible to any interpretation which the wisdom of a legislator can demand.'<sup>2</sup> It is an elastic word, or at least is the Greek

<sup>1</sup> *Modern Churchman*, March 1930, p. 680.

<sup>2</sup> *Decline and Fall* (ed. Bury), Vol. IV, p. 482.

equivalent of some elastic Aramaic word which was in use in the 1st century, and signified any kind of unchastity. This may well have meant any serious matrimonial offence. Dr. Schmiedel suggests<sup>1</sup> that at the Council of Jerusalem it signified a marriage within the prohibited degrees of affinity (*vide* Lev. xviii. 6-18). In the two excepting clauses in Matthew it is the equivalent of adultery, although in Matt. xv. 19 and Mark vii. 21 it is distinguished therefrom. The word is used also to signify idolatry, which was a breach of the loyalty due from the Jewish people to Yahweh God. This elasticity of meaning may well extend the significance of the word to indicate any cause of matrimonial undoing of equal gravity. Indeed we are well assured by the examples of contemporary life that while adultery is the ostensible (and indispensable) ground for divorce, the real ground often lies deeper in some form of incorrigible incompatibility; and no loving spouse will (at least on reflection) divorce a partner for such aberration as a single act of adultery. In his lately published book, *Marriage: Past, Present and Future*, Mr. Ralph de Pomerai argues ingeniously that the note of general disloyalty should be read into the use of this word 'fornication.'<sup>2</sup> For otherwise, as he contends, the exception in Matthew would suggest that, in the estimation of Jesus, sexual unfaithfulness was the worst of all possible offences; whereas an examination of the Gospels shows much more crushing denunciations of those other offences, hypocrisy, self-righteousness, malice, hardness of heart, which go to make fundamental incompatibility and strike at the root of healthy, vital, spiritual union, and may be as effective as sexual difficulty in producing matrimonial misery and dissolution.

It is doubtful, however, if this very wide interpretation can be maintained in application to the words 'fornication' and 'adultery' in the reported words of Jesus. Dr. Charles is prepared to extend the meaning to exclude all unchastity, of which he gives five examples.<sup>3</sup> We may, perhaps, suppose that in a clear case of fundamental incompatibility Jesus would have given judgement on the merits of the case, and would have regarded an obstructive impediment to lifelong union as being at least as good ground of divorce as an act of unchastity. But, in the endeavour to establish the ideal of permanent union, His reported words

<sup>1</sup> *Encyclopaedia Biblica*, col. 924.

<sup>2</sup> *Vide* p. 196 f.

<sup>3</sup> *The Teaching of the New Testament on Divorce*, pp. 98-111.

repudiated the facile separations of the School of Hillel and concentrated on the particular sanctions of the School of Shammai. On the actual evidence it cannot be said that the pronouncements in the Gospels take within their purview other or larger grounds than those which were definitely sexual. Yet the application of the whole spirit of the Gospel would cover any case which shows that the conditions of complete union have been rendered impossible. The fundamental principle of the Majority Report of the Royal Commission published in 1912 seems to manifest the essentially Christian spirit, in contrast with the legalism of Scribes, Pharisees, and later authors and exponents of the Mediaeval Canon Law, viz. that marriage ought to be dissoluble upon any grounds which have frustrated what by universal admission are the fundamental purposes of marriage.

It would be difficult to maintain that the Founder of Christianity, confronted by the present conditions of the law and practice of divorce in England, would engage in a wholesale condemnation of all who have been through the Courts and have re-married. Many persons would no doubt have earned His disapproval as deliberate adulterers. But He would assuredly penetrate beyond the adultery of many others to the deeper causes which so often lie at the root of matrimonial disease, and would recognize, what many of His professed followers, with duller vision and smaller charity, are slow to see, that great numbers are driven into qualifying for divorce in the only way which the inherited law allows. As an Idealist, He would doubtless re-enunciate the ideal of lifelong monogamous union, and leave the State to legislate for the relief of inevitable matrimonial failure. Were it possible to conceive of Him as a legislator with autocratic powers, it is certain that He would find the true solution in a system far remote from that which we have inherited from the old Ecclesiastical Courts. In the present conditions of admitted chicanery and scandal it might seem to be more in accord with the spirit of Christ's Religion to exclude the present ground, and indeed to disallow divorce except on the ground of fundamental incompatibility or by a carefully guarded process of mutual consent. On any other than the later sacramental principle it would be impossible on Christian grounds to justify the device of permanent separation, which sets an official stamp on matrimonial failure without dissolving the marriage.

At this point further light is thrown upon the interpretation of incompatibility by the earliest reference to divorce which the New Testament offers. In the First Epistle to the Corinthians St. Paul applies himself to sexual and matrimonial relations. Life in the Greek cities would seem to be lax by comparison with the newly established Christian ideal; and the Christian converts in Corinth would need instruction in Christian principles from the founder of their local Church. At the date of this Epistle (A.D. 55) there is every reason to believe that St. Paul's principles on such a point were in reasonable accord with those of the Founder of Christianity; otherwise there would have been enough testimony from those who remembered the Lord to controvert the Apostolic judgement. In chap. vii of this Epistle he speaks authoritatively (and invokes the Lord) when he adjures married persons to treat their marriage as binding. For in verse 10 he writes:

'But unto the married I give charge, yea not I, but the Lord, That the wife depart not from her husband,'

and in verse 11:

'(but and if she depart, let her remain unmarried, or else be reconciled to her husband); and that the husband leave not his wife.'

As Dr. Charles maintains in his *Teaching of the New Testament on Divorce*,<sup>1</sup> the right rendering of the word heretranslated 'depart' (*χωρίζεσθαι*) is 'desert,' and the word here translated 'leave' (*ἀφίεναι*) is 'divorce.' Then the sentence in brackets, attributed to a later scribe, would become merely an injunction to obey the law which did not permit a woman to be re-married unless she had been divorced. Yet this verse has been cited by the Church as Apostolic authority for the refusal of re-marriage after divorce. This could be warranted only if the word *χωρίζεσθαι*, 'depart' (properly 'desert'), were taken to mean divorce—'that the wife divorce not her husband' (verse 10), or 'if she divorce (her husband)' (verse 11)—a practice not permitted to Jewish wives until A.D. 1100, and, as we have seen, allowed in Roman Law only after the decline of the ancient forms attaching to marriage. But, in the degree in which it had come into general use in the Roman Empire at that date, it would no doubt warrant a scribe in this

attempt to adapt the Apostle's quotation of a saying of the Lord to Gentile conditions. In any event divorce by a wife, on terms hardly less difficult than by a husband, was permissible in Greece at least in theory and by Attic Law. But to translate 'divorce' instead of 'desert' does violence to reason, because it would imply that the Founder of Christianity had supposed an impossibility—divorce by a Jewish wife. Yet that violent rendering alone can give to the words in brackets the meaning in which the Church has found Apostolic authority for the doctrine of the indissolubility of marriage. Dr. Charles ascribed the foundations of this doctrine to the interpretation of an ignorant scribe.

St. Paul then proceeds (verse 12) to deal with the case of mixed marriages, where one party is a Christian and the other a heathen, or unbeliever. Again he recommends the retention of the marriage, when the unbeliever is agreeable to its continuance. But (verse 15), if the unbelieving party refuses to continue, and breaks up the marriage in consequence of the conversion of the other to Christianity, the Apostle will then permit the Christian who has thus been deserted to regard the marriage as null and to marry again:

'Yet if the unbelieving departeth (i.e. deserts), let him depart: the brother or the sister is not under bondage in such cases' (i.e. is free to marry again).

What is this but divorce and re-marriage—not indeed by legal process as we know it, but in relevant principle? Had it been divorce by legal process, a different Greek word would have been used, and re-marriage would have been assumed. In their book, written in answer to the opinions of Dr. Charles, both Dr. Gore and Dr. Box appear to be of the same mind that St. Paul permits this measure of divorce and re-marriage; but they contend that he expressly excludes them where both the parties are Christians.<sup>1</sup> Here again we are in presence of the theory of dominical legislation in contrast with the other Christian doctrine of ideal. It is agreed that a perfect marriage is intended to be permanent. This is not the question at issue, for nobody wishes to promote matrimonial collapse and dissolution. The question is, once more, what is to be done when marriages break down? The marriages of Christians ought not to break down; but Christianity will not guarantee compatibility; and as often as a marriage breaks down,

<sup>1</sup> *Divorce in the New Testament*, pp. 51, 52.



so often the doctrine of indissolubility by dominical legislation breaks down too. Lifelong union is not merely the Christian ideal; it is the ideal of every marriage undertaken with honest purpose. If the Apostle admits religious incompatibility as a ground of dissolution and re-marriage, why not other and possibly deeper causes of incompatibility? As Dr. Newman Smyth wrote in *Christian Ethics* of such other offences beside adultery as may be thought to contribute a ground for divorce:

‘In proportion as we are satisfied that it is in its consequences as destructive of the possibility of moral continuance in the married relation, we shall be inclined to think that it is included under the supreme principles which controlled the judgements of Jesus concerning certain habits, at which Moses winked, of the easy putting away of a wife. In other words we shall argue that divorce for such other cause justifies itself to the Christian conscience, because we are satisfied that Jesus Himself, if He were present and speaking to the men of our times, in the same intent and spirit in which He spoke of old, would pronounce this cause to be as heinous as adultery in its destruction of the sacredness of the Marriage Bond.’<sup>1</sup>

This argument, of course, proceeds on the basis of the principle inherited from the Matthaean exception, viz. that adultery is the most heinous matrimonial offence, and that there is dominical authority for its being thus regarded. But experience would seem to show that, apart from a deliberate policy of matrimonial unfaithfulness in which adultery would be the obvious offence, there are other more serious causes of matrimonial failure. Divorce on the ground of a single act of adultery becomes ludicrous when set against the fact that long continued cruelty admits of no remedy, other than permanent separation, unless it is coupled with adultery. The sole justification for divorce on the ground of a single act of adultery is that this alone, under the English law, provides the formal ground of a suit through which to effect escape from an union which has failed more lamentably in other ways. The Christian ideal is set forth for the improvement of matrimonial responsibility, permanence, enlightenment and love; and it becomes impossible to uphold those ecclesiastical apologists who conceive Christian marriage as a lifelong tyranny or an irremediable cruelty, for which other systems, and the Civil Law of many other countries, provide varieties of relief.

<sup>1</sup> P. 414.

We have been compelled to give rather protracted consideration to the treatment of marriage and divorce in the Christian Canonical Scriptures, both on the practical count that the exception in Matthew has been the basis of legislation in matrimonial causes in England, and on the larger count that as a Christian nation we do not in our legislation consciously contravene what we believe to be the principles of Christianity. Yet Christian principles are something larger than the letter of the teaching of Jesus. It is the spirit of that teaching which is our guide, not because we should be tied for all time to the teaching of a Jew who flourished in a small dependency of the Roman Empire on the Eastern basin of the Mediterranean some 1,900 years ago, but because His life and teaching were 'self-authenticating,'<sup>1</sup> because they told the generation of His contemporaries, as they tell us still, that there in the manhood of One who was human, a product of His age and country, subject to the intellectual and physical limitations of His time and circumstances, were the character and the spiritual truth which were nothing less than what the world had sought in its search for God. The Christian Church has turned marriage into a sacrament, and compassed it about with inviolability. In its determination to preserve it thus, the Church has seized upon the most rigorous of the Lord's sayings, and both distorted it as legislation and depressed it as enforcing a physical bond. The Church has tried to sustain the ideal by the force of the law, and has failed. The human soul cannot be thus constrained. Yet man responds to the highest ideal where that is presented as the Truth of Eternal Righteousness in terms both of human sympathy, and of the search of the human soul for the haven where it would be. Marriage is a human, not an ecclesiastical, institution. Christianity did not invent or institute marriage, but the Founder of Christianity raised it to a loftier level in the scale of idealism. Our Christian concern must be chiefly that marriages shall be undertaken with due thought and experience and responsibility, rather than that marriages which prove to be mistakes should be maintained. If the wrong people mate, there is no sound principle on which they can be tied for life and prevented from seeking new and

<sup>1</sup> The phrase is borrowed from the Rev. J. S. Bezzant's extremely able paper on 'The Authority of Jesus Christ,' in the *Modern Churchman*, Conference Number, October 1928, p. 495.

more promising unions. Education more than legislation is our need. For, granted the education, the legislation will follow.

The Christian theory of marriage, as exemplified in the teaching and practice of the Founder, of course is sacramental. If marriage is not one of the Sacraments, as in the Roman Church, it yet contains sacramental elements in any Christian conception; a spiritual union which a legal ceremony attests, or, as the 'sign' at the Marriage Feast at Cana is rightly interpreted, 'the waters of legal purification changed into the wine of marriage joy.' The issue then is this: if the spiritual union fails, the legal union cannot finally be maintained. The tragedy of divorce is the tragedy of failure, which may or may not be the tragedy of crime. It is the work of legislation to provide for the relief of misalliances and, with due provision for the interests of property and inheritance, to allow the attainment of spiritual and physical unions in new legal marriages, when the fundamental purposes of marriage have been frustrated.

NOTE.—While the customary reference by Christian Scholars of the dominical pronouncements on divorce to the dispute between the Schools of Hillel and Shammai has been adopted in the foregoing chapter, it is right to note the view that this is not conclusive. It has been urged that, as a matter of strict accuracy, while the two Rabbis, Shammai and Hillel, themselves respectively flourished, the one immediately before and the other at the time of the foundation of Christianity, the Schools (literally 'houses') of Hillel and Shammai were a later development. According to the evidence of Dr. H. Adler, the Chief Rabbi in England, before the Royal Commission in 1910, it is doubtful if the positions attributed to the Schools do accurately reproduce those maintained by their Rabbinical founders (*vide* Minutes of Evidence, Vol. III, Q. 41, 433-4, and footnote). Mr. (afterwards Dr.) Israel Abrahams, however (Q. 38, 395 ff.), was not certain on this point. He did not disallow the possibility that the Schools, or houses, functioned from the time of their founders; and thought that the Gospels reproduced a discussion of the Schools. Dr. Abrahams also issued a caution (Q. 38, 397) against the too ready assumption that the teaching of Hillel was 'lax'; for the so-called laxity was due to the high and humane view which he took of the need of the maintenance of 'absolute harmony in the married state.' See also Royal Commission, Minutes of Evidence, Appendix I, by J. E. G. de Montmorency, p. 6.

## CHAPTER III

### CHANGES UNDER THE CHRISTIAN EMPERORS

The old Roman Law of Marriage, varying, developing, and (according to inherited English standards) lax at all times, had the great merit that it realized the limitations of the physical bond, and adapted its legal provisions to the recognition of larger factors. Critics of the lax conditions of matrimonial dissolution and reassociation in the Roman Empire are disposed to lay the blame for this upon the principle expressed in the maxim of the Civil Law, '*Nuptias not concubitus sed consensus facit.*'<sup>1</sup> This principle could be carried further to the point of saying that neither consummation nor legal consent matters to marriage, but love. But consent, if it be continuing, must mean some measure of love; and to that extent the Romans were right. The defect of the Roman system lay not in its foundation principle, divorce by mutual consent, but in the absence of requisite legislation for the protection of the principle from the abuse of unbridled promiscuity.

The reaction of the Christian Church to these conditions was intelligible but ill-directed. The Christian Fathers were no good examples of Christian regard for the value or the rights of women, and it is not surprising that they should on that account have denounced the laxity of the marriage laws in practice, although they showed a great indecision on points of principle. The effect of their influence was to resist the best features, and to promote the worst, of the maturing policy of the Roman jurisprudence. A combination of reference first to the texts of the New Testament, which set high ideals in principle but whose actual form concerned a period of feminine depression; secondly, to the inherited Jewish subordination of women; and thirdly, to the natural tendency of some Roman women to take advantage of the liberal provisions of the Roman Law, which was sound in principle but defective in precaution, led to an unhappy attempt to circumscribe Christian marriage as an institution at the cost of the status of women. Although in theory the Christian Fathers did not disallow divorce, their estimate of women disqualified them

<sup>1</sup> Ulpian in *Digest*, I, 17, 30.

from appreciating the element of mutual consent in marriage. Whereas the tenor of the Christian Gospel and of the pronouncements of the Founder of Christianity was to raise the dignity of women, there is evidence that the influence of the Church in the Empire led to women's degradation. Even St. Augustine, whose ideal of asceticism caused him to regret his own marriage, put polygamy and prostitution in the category with marriage, and described them as being as necessary to man as a sewer is to a palace. At best he regarded marriage as a remedy against sin: he would enjoin upon a married woman a kind of debased slavery, and required her to 'endure joyfully the debaucheries and ill-treatment of her lord.' And St. Jerome described a woman who re-married as 'a dog returning to its vomit or a sow seeking again her wallowing place.' The recognition of any divorce went with the implication that every ground for divorce was a crime. St. Augustine, being unable finally to decide for or against the legitimacy of divorce on reasoned grounds, cut the knot by adopting the safe ecclesiastical position that marriage was indissoluble.

Under such influence the Christian Emperors might be expected to take steps to revise the Roman Civil Law. But for the first two centuries of their *régime* this process was not pronounced, and in practice the Church acquiesced in the inherited system. Constantine, who had proclaimed the Empire Christian, and had presided at 'the great and holy synod of Nicaea,' allowed the principle of divorce by mutual consent, but insisted on adequate grounds, and imposed penalties of forfeiture of property on those who parted company on lesser grounds. He also conditioned the *repudium* with pecuniary penalties. His successors, Theodosius and Valentinian, simplified the enactments of Constantine by setting out the grounds for divorce in a code, and explained the need for some restriction of divorce by reference to the interests of the children of a marriage. It was not until the reign of Justinian that any radical change was made. This Emperor, who consolidated the whole of the Roman Civil Law, and whose work, accomplished in the *Codex*, the *Pandects* or *Digest* and the *Institutes*, remains a landmark in legal history,<sup>1</sup> was apparently not

<sup>1</sup> The *Codex* of 529, revised, elaborated and incorporating the 'Fifty Decisions' which had intermediately been drawn up to answer points disputed among the older jurists, appears in its final form in 534, in twelve books, containing the imperial constitutions up to the date of publication. The *Digest*, or *Pandects*,

content with his *rôle* until he had figured as a legislator, and attempted to apply ecclesiastical principles to the laws of marriage and divorce.

The credit which has ever been given to Justinian's achievement of consolidating existing law is not due in the same degree to his new legislation. The *Novellae* or Novels, foreshadowed in the *Codex*, were published at intervals between 535 and 564, the majority in the first ten years. Those which dealt with marriage and divorce proved in respect of their most radical, or reactionary, provisions to be impracticable. It is true that in his 22nd Novel in 536 Justinian re-enacted the existing ground of mutual consent as sufficient to obtain a divorce. But in the 117th Novel and the 134th Novel (in 556) he imposed severe restrictions and penalties. Justinian prohibited divorce by mutual consent except on three grounds. The first of these, the impotence of the husband, was actually a new specific ground in Roman Law except in the case of *castrati*, whose marriage was impossible under the impediment of obvious incapacity and *ipso facto* void. This last impediment is recorded in the *Digest*,<sup>1</sup> but, together with other prohibitions not resulting from ties of relationship, is apparently included only in the collective reference in the *Institutes*.<sup>2</sup> Apart from this, marriages were not void on the ground of impotence; and under the middle Roman Law there was indeed no necessity for such provisions, because the facilities for divorce readily met the needs of any marriage which was marred by either initial or subsequent impotence. But when Constantine insisted on adequate grounds for divorce by mutual consent, and Theodosius and Valentinian codified the restricted law, they did not include impotence. Before Justinian effected further restriction, he had introduced this ground of impotence in a constitution of 528 and incorporated it in the *Codex*.<sup>3</sup> The allegation of impotence could then be upheld only after two years of marriage.

appeared in 529 in fifty books of extracts of all that was valuable in the writings of the older jurists. Of the extracts from thirty-nine jurists, those from the works of Ulpian and Paul formed half of the work. The *Institutes* were promulgated at the same time in order to furnish matter for elementary legal study in the schools. This elementary work had its foundation in the *Institutes* of Gaius, and was amended when necessary in conformity with the *Codex* and the *Digest*. These works, of the greatest importance to the study and understanding of the Roman Law, were primarily records of existing law and opinion, and only occasionally included enactments of new law.

<sup>1</sup> XXIII, 3, 39.

<sup>2</sup> I, 10, 11.

<sup>3</sup> V, 17, 10.

But in view of his discovery that husbands had been known to recover their powers after two years, Justinian in his 22nd Novel (C. 6) increased the period to three years. The second ground on which Justinian permitted divorce by mutual consent was the retirement of either party to a monastery. This was obviously an ecclesiastical device which had been introduced under the influence of the Church, and lent itself to frequent fictitious use. Under Justinian's legislation, in which it was incorporated, it allowed the re-marriage of the party who did not retire to the monastery, and this ground of divorce survives in the Eastern Church. The third ground, which to modern ears sounds a liberal and humane provision, allowed the captivity of one of the parties to justify the mutual consent to separate. In another age these provisions might appear to indicate a growing leniency. In the circumstances of their introduction they proclaimed a suddenly increased severity. These grounds survived the later legislation of Justinian; but other permission for divorce by mutual consent was restricted under the provisions of the 117th Novel to those grounds which had the authority of that Novel; and finally, all divorce by mutual consent, except on the limited grounds enumerated, was disallowed by the 134th Novel under pain of severe penalties. Although the divorce was not legally invalidated, the parties thus divorced by mutual consent were deprived of the right of re-marriage; the wife was subjected to life-long confinement in a monastery and the confiscation of her property, one-third of the property being directed to the enrichment of the monastery, and two-thirds passing to the children, if any, of the marriage; but the husband appears to have been subject only to pecuniary penalties (*vide* Novel 117).

The matrimonial legislation of Justinian was not confined to these restrictions in the Novels. The almost complete abolition of mutual consent as a ground of divorce went with the re-enactment of a number of specified grounds, with some modification; and although treason appeared first in the list of grounds in the 117th Novel, it was not then new, but was re-enacted from the legislation of Theodosius and Valentinian. Thus a man could divorce his wife if she failed to inform him of plots against the State; if she either attempted herself, or failed to inform him of other, plots against his life; if she frequented balls or dinners without his knowledge or against his will, or if she otherwise

absented herself from home except in the company of her parents; and further, if she procured abortion. It will be seen that these grounds provide less for relief from the genuine sources of matrimonial breakdown, and more for the establishment of masculine dominance and privilege. That the wife was also empowered to obtain a divorce from her husband for nearly as many reasons does not detract from that impression. The first two grounds establish equality, and provide for the divorce of a husband who plots against the State, or attempts his wife's life or fails to disclose plots against it. The last three grounds all concern sexual immorality and show the narrowing influence, which aimed at enforcing chastity by tyranny rather than promoting happiness by giving relief, behind Justinian's reforms. Thus a wife could divorce her husband if he tried to induce her to commit adultery, if he accused his wife falsely of adultery, or if he consorted with another woman either in his own house or in another. The array of grounds concerns the safety of the State and of human life, and the commission of adultery or the suspicion of it. There is no mention of continuous cruelty or savage temper, and the idea of incompatibility of any kind as a ground has practically disappeared.

Although Justinian's laws did actually admit of divorce *a vinculo* with the right of re-marriage, they left but a step to be taken to the theoretical rigour of the Canon Law. The step, a short one of principle, proved to be a long one in time; and after the reign of Justinian there was to be a long period of relaxation from the sudden and severe strain of his cramping legislation. The deprivation of the old liberties defeated its purpose by fomenting discontent. Enforced celibacy proved a dangerous explosive; and neither did confinement in monasteries conduce to chastity, nor did the enrichment of these institutions, at the cost of human infelicity and arbitrary confiscation, commend the matrimonial legislation of this otherwise eminent imperial lawyer.

Justin, the nephew and successor of Justinian, succeeded in 565. He referred to Justinian as his 'pious father,' but at once proceeded to repeal the restrictions which had been placed upon divorce by mutual consent. Justin held that such legislation was impracticable at that time, and in his second Novel he restored mutual consent as a ground, asserting that 'if mutual affection



is the true basis of marriage, it is right that when the parties have changed their minds they should be allowed to dissolve it by mutual consent.<sup>1</sup> The words of this Christian Emperor are not to be taken from the context of history, or employed to suggest an orgy of irresponsible and constantly changing alliances, prompted by passing whims. For in practice Justin employed argument and reason with parties who could not accommodate themselves to any of the statutory grounds enacted by the previous Emperors, but who had come to regard one another with implacable hatred. He regarded divorce by mutual consent as the only practical outlet, unless the grounds for divorce without consent were enlarged to include all conceivable contingencies.

Later Emperors followed his reaction from the high-water mark of ecclesiastical intolerance in the Christian imperial period. It is true that Leo, the Isaurian, imposed new restrictions in the 8th century and sought to prohibit mutual consent; but even at the end of the 9th century the Emperor Leo, whose Novels contained the last imperial pronouncement upon marriage and divorce before the long reign of the Canon Law, who indeed prohibited mutual consent and would make ecclesiastical ministration necessary for valid marriage, could not find in the Scriptures, which he freely quoted, the ecclesiastical conception of the indissolubility of marriage. The sense of the Gospels and the literal application of texts, as though these were statutes, were seen to make strange, ill-assorted and controversial company. Thus Justin may rightly be said to have preserved the old Roman Civil Law from the encroachments of the Church, and, whether he be accounted reformer or reactionary, to have set the note of liberty for his successors through three centuries; 'He yielded,' wrote Gibbon, 'to the prayers of his unhappy subjects, and restored the liberty of divorce by mutual consent; the civilians were unanimous, the theologians were divided, and the ambiguous word which contains the precept of Christ is flexible to any interpretation that the wisdom of a legislator can demand.'<sup>2</sup>

<sup>1</sup> Novel 140: 'Si namque mutua affectio matrimonia conficit, merito diversa voluntas eadem per consensum dirimit.'

<sup>2</sup> *Decline and Fall* (ed. Bury), Vol. IV, p. 481.

## CHAPTER IV

### THE CANON LAW IN MATRIMONIAL CAUSES

The impact of the Church upon the old Roman Civil Law was justified perhaps as a protest against some examples of excessive laxity; but it was misdirected by the narrow interpretation which the Christian Fathers placed upon the New Testament. We have seen how the new legislation of Justinian failed to impose the 'Christian' principles which it professed to embody; and Justin, who realized that it was 'not applicable to our time,' reverted to the old Roman divorce by mutual consent, which thereafter was not finally displaced for three centuries. The Emperor Leo in the 9th-10th century was able to reconcile much of the old Roman Civil Law with his reading of the Scriptures; but even he repudiated divorce by mutual consent, and it might be said that his was the last rational reign before the cloud of the Canon Law settled on Europe and for some centuries extinguished the light of reason.<sup>1</sup> 'To pass from the Civil Law of Rome to the Ecclesiastical Law of the Dark and Middle Ages is like quitting an open country, intersected by good roads, for a tract of mountain and forest where rough and tortuous paths furnish the only means of transit.' Such was the opinion of the late Lord Bryce, a lawyer and humanist whose authority is outstanding.<sup>2</sup> Under this ecclesiastical *régime*, wherein the secular power of the Emperors obeyed the ecclesiastical decrees of the Popes, the doctrine of the indissolubility of marriage dominated the private lives of the citizens of all the countries of Western Europe.<sup>3</sup>

<sup>1</sup> Leo, either by his own intent or by that of an ecclesiastical translator of the Roman Civil Law into Greek, omitted Justin's Novel which restored divorce by mutual consent.

<sup>2</sup> *Studies in History and Jurisprudence*, Vol. II, p. 811.

<sup>3</sup> The use of the term Canon Law, which has already occurred with frequency in these pages, may seem to demand some treatment. 'Canon' is a word of Greek origin, and is derived ultimately from *κάννα* or *κάννη* (in a rarer form *κάνη*), meaning a reed or cane. Hence there was in use the word *κανών*, which is found in Homer, and means a rod or bar. In further development the word signified a carpenter's rule, and from this use it acquired the sense of a rule or model of excellence. The old Greek authors were considered to be the *κανόνες*, Canons, or standards of the classical style. The word then came into use to signify the Books or Scriptures which the Christian Church accepted as authoritative and admitted in the formation of the Bible. Thus certain books were admitted

The Canon Law signifies the rule of life derived from the Canonical Scriptures and cast into legislation which may or may not conflict with the Civil Law of any country. It may be said that the Canon Law came into being, potentially but not formally, as soon as ever Christian principles were asserted in the early Church, and were established as authoritative in the lives of Christians, in contradistinction to the prevalent practices of the pagan world. Christianity began in the preaching of ethics and ideals, but it quickly grew into an organization which required rules. In his *Marriage in Church and State* Dr. Lacey gives some tentative examples of this tendency, and writes:

‘It is possible that the express prohibition of fornication by the Apostles and Presbyters at Jerusalem (Acts xv. 29) was a decree requiring men to abstain from that intercourse with unmarried women which the Greek conscience freely allowed, thus making the offence of adultery identical in husband and wife. What stands out perfectly clear is the fact that rules were thus made; that is to say, that there was an incipient Canon Law of marriage, enforced by the discipline of the Church.’<sup>1</sup>

The Canon Law governed many things beside Marriage, but it is in relation to Marriage that it has been most conspicuous in history; and this citation takes us straight to our subject. It could be shown that the arguments of St. Paul were not entirely used to maintain the indissolubility of marriage; but where<sup>2</sup> he appears to countenance divorce and re-marriage in the case of a Christian married to an unbeliever and suffering consequent spiritual incompatibility, his pronouncement would equally be described as ‘incipient Canon Law.’ The point is that the Canon Law may be in agreement or disagreement with the Civil Law or secular custom, but is an authority which purports to be the law of God. Such is the claim of the Canon Law; and it is clear that there are conditions in which its claim could be upheld. In relation to matrimony the Canon Law grew into a great system of legislation which opposed, embraced and finally superseded the Civil Law; but in its origin it stood for the religious claim to

into the Canon at a later date than others, and in one example, the Apocalypse or Revelation, only after some hesitation. The word is used to signify the rules by which judgement is exercised in various branches of knowledge and practice, e.g. the canons of literature or the canons of art. It has a slang equivalent, ‘the rules of the game,’ a phrase often applied far afield from the actual playing of games.

<sup>1</sup> p. 117.

<sup>2</sup> 1 Cor. vii. (esp. verse 15).

maintain true marriage. The incipient Canon Law upheld ideals. The developed Canon Law was a vast compilation of prohibitions, impediments, and facilities for the evasion of its own enactments. The process which produced this result is traceable through a series of representative patristic opinions, conciliar canons and papal decretals.

From the first signs of Christian direction and control in the New Testament, of which an example has been given, it is no far cry to the Epistle of Ignatius to Polycarp in the 2nd century, wherein the writer establishes the principle of Canon Law:

'It is proper for those inter-marrying to effect their union under the direction of the bishop, that their marriage may be after the Lord, and not after their own lust.'

This embryonic Canon Law did not attempt to override the existing Civil Law or prevalent secular custom; it merely provided rules for Christians, and prescribed the area of liberty in which they could avail themselves of the law and practice of the secular State. Thus Origen in his *Commentaries on St. Matthew*,<sup>1</sup> written about the middle of the 3rd century, notes that some bishops at that time would allow the re-marriage of divorced husbands or wives on the ground that sexual incontinence was better provided for in conditions of matrimonial regularity than in a state of separation in which re-marriage was forbidden. Thus early did the Church indulge in the practice of dispensation from the rigid rule of indissolubility which it derived from its literal reading of the Scriptures. For although it is unlikely that the rule of indissolubility was suddenly and effectually imposed, there can be no doubt that it was early accepted as an ideal; and a dispensation from an ideal rule of the Church is as possible as from an established canon. If the view advanced under "The Contribution of Christianity"<sup>2</sup> be sound, viz. that the Markan pronouncement of indissolubility, and especially the second clause of that pronouncement, was the work of an editor reacting against the conditions of divorce and re-marriage in Rome, the evidence would seem to point to the mind of the early Church with greater certainty than if the words were actually dominical, without evidence that they were credited early with legislative value. Again, before the Canon Law grew into the later body of legislation, Church councils

<sup>1</sup> XIV, 23.

<sup>2</sup> Chapter. II, *supra*.

were found to formulate canons providing for the restoration to Communion of a wife who had left an adulterous husband and married another; and withholding censure from those who in the innocence of youth, after detecting their wives in adultery, indulged in divorce and re-marriage.<sup>1</sup>

It is clear that the rigid rule of indissolubility was not invariably maintained by the authorities of the Church at the time of the conversion of the Empire to Christianity. Yet this does not imply any serious relaxation of the Church's rules in deference to the Imperial Civil Law. For in practice under the Christian Emperors the pressure of the ecclesiastical standard produced some changes in the Civil Law on what professed to be Christian principles, and this movement reached its height in the monumental labours of Justinian, but afterwards declined in deference to human needs. The growing Canon Law influenced from time to time the enactments of the Civil Law, but actually developed independently in all matters technically religious, including marriage, and extended its influence until it took the place of the Civil Law, when the Popes acquired greater power than the Emperors. Three phases of this general process are traceable: the confinement of ecclesiastical rules to those who accepted their spiritual discipline, the amendment of the Civil Law to agree with supposed Christian teaching, and the regulation of social practice by the Church. The Canon Law succeeded in the last of these achievements: the earlier phases were but steps in the process.

We have discovered an 'incipient Canon Law' even in New Testament times; but the application of the later term to Apostolic pronouncements suggests that the Canon Law must have had a beginning as a definite independent body of law. The difficulty of fixing the date of a protracted historical process, as e.g. the Reformation, besets us here; but presumably the Canon Law may be said to have come into existence with its first independent compilation. A Roman Abbot, Dionysius Exiguus, who flourished in the middle of the 6th century, and was thus a contemporary of Justinian, produced the collection of canons which set the pattern of all subsequent collections. It is a notable coincidence, which gains in value and importance from the contemporary production of Penitentials alike in East and West, that while Justinian was bringing the Civil Law into greater conformity with Church

<sup>1</sup> These are exceptions to the general severity of the Canons of Arles, A.D. 314.

opinion, the Church was at the same time formulating its own law, both for society and for the individual. Three distinct movements, separate in basis, yet touching at many points the same subject-matter, and overlapping in the area of jurisdiction, are working through the three phases of development which led to the dominance of the Church in the Middle Ages.

This tendency is nowhere more noticeable than in the Church's growing control of marriage. While the Civil Law reacted temporarily from the stricter legislation of Justinian, the Canon Law proceeded to new severity. Between this time and the last gesture of an independent Civil Law in Matrimonial Causes, before the Emperor Leo, known as 'the Wise,' or 'the Philosopher,' decreed in his 83rd Novel that only ecclesiastical marriage should be legitimate, the outstanding event was the Quinisext Council of Trullo in 692. The decrees of this Council determined the conditions of the marriage of clergy, and extended the impediments on the marriage of kindred and affinity even to exclude the marriage of sponsors and parents at baptism, and of Churchmen with heretics. They declared marriage after divorce to be adulterous, and even pronounced an espousal to be binding, and thus gave to a pre-contract the validity of a marriage.

Although this Council affected primarily the Eastern area of the Church, and was not accepted in the Western, yet some of its canons found their way into the Western Church and influenced the stringency of the Western Canon Law. It is probable that the Council of Trullo stiffened the determination of Leo III, the Isaurian, in 740 to repeal the Novel of Justin which had restored divorce by consent.

From Justin to Leo the Philosopher, at the end of the 9th century, as we have seen, the Civil Law remained independent, and showed within the Christian Empire a certain continuing separation of Ecclesiastical and Imperial Law. Yet throughout the history the Church maintained an effectual encroachment. The Canon Law continued more and more to assert itself; proclaimed canons of divine authority in contrast with human custom; and determined for Church and Empire alike the laws of marriage which the developed sacramental principle was to buttress in succeeding history. That this Canon Law should have derived an authority from the remote legislation of Leviticus might seem to us to throw doubts upon its value. But at that period such a source of authority

did not in any wise deprive it of its weight. After the reign of Leo, at the end of the 9th century, the Church was fairly in the saddle, and the consolidation of its position in further collections of canons and decrees through the next two centuries reached its consummation in the famous *Decretum* of Gratian. Franciscus Gratianus, a monk at Bologna, and reputed Bishop of Chiusi, codified the Canon Law. His work, the *Concordia Discordantium Canonum*, afterwards known as the *Decretum*, was completed before 1150. It provided the basis and material of the *Corpus Juris Canonici*, which followed the revived study of the *Corpus Juris Civilis* in the schools of Bologna. It consisted of a collection of all the canonical texts fitted into a dissertation of his own, of which to-day not the texts but his own original opinions, wherein the texts have their setting, are considered the more worth reading. His work falls into three parts: first, the sources of Canon Law, 101 *distinctiones* subdivided into canons proper; secondly, 36 *causae* (cases propounded for solution), subdivided into *quaestiones* (questions raised by the case), to which are appended the relevant canons and decretals; thirdly, 5 *distinctiones* concerning sacraments and ceremonial, and entitled *De Consecratione*. The *Decretum* thus followed the pattern of the Civil Law. 'It is a great Law Book. The spirit which animated its author was not that of a theologian, not that of an ecclesiastical ruler, but that of a lawyer.'<sup>1</sup>

Until the work of Gratian, ecclesiastical authority was enforced by reference to a medley of confused and frequently conflicting canonical decrees. But under the influence of the Roman Civil Law ecclesiastics realized the value of an orderly *corpus*, and desired a repetition of the method of the *Corpus Juris Civilis* in the *Corpus Juris Canonici*. The Church was becoming the recognized legislative and administrative authority over a certain sphere where the Civil Law once had been supreme. The effect of Gratian's work was to equip the Church for this function with an authoritative *corpus* of its own law. With this equipment, yet to be further enlarged and adapted, the Church controlled *inter alia* the practice of marriage and divorce in Western Europe, until the Reformation in some countries, and until the present day in others. After the publication of the *Decretum*, as Sir William Holdsworth writes in the great legal historical work of this century,

<sup>1</sup> Pollock and Maitland, *History of English Law*, Vol. I, p. 92.

'the Canon Law stood side by side with the Civil Law as a distinct and rival body of learning. Both these bodies of law were taught and commented on and developed in the Universities in separate faculties and by very similar methods.'<sup>1</sup>

Gratian's work was not final, important and enduring as it proved to be. Indeed, according to Professor Maitland, it was already antiquated in 1234, and was 'a book for the lecture-room rather than the law court.'<sup>2</sup> But it may be said that it was so effectual that it was only 'not final' in the sense that there is no finality in a world of life and movement. The *Decretum* was followed by a series of additions, variously known as *compilationes* and *extravagantes*. A century after the *Decretum* another monk, Raymond of Pennafort, produced five books of decretals from the extravagants of recent Popes, and added them to Gratian's work with the authority of Gregory IX. To these Boniface VIII added the *Liber Sixtus*. Clement V was responsible for the collection of canons called the *Clementinae*, which John XXII published for the use of the Universities in 1317 in addition to his own extravagants; and Sixtus V added yet a seventh book of decretals in 1588. In the meantime the Council of Trent had begun its work of renovating the Catholick Church. Yet neither the Tridentine reforms nor the preceding canonical compilations amended the main principles of the Canon Law in the matter of marriage and divorce, which the earlier canonists had drawn from their literal reading of the Scriptures, and in which the Church lawyers found the means of acquiring control of matrimonial affairs. The principles which were seen to be fundamental to this ecclesiastical domination were: (1) the theory of the nature and constitution of marriage; (2) the prescription of the conditions of divorce; and (3) the establishment of legal authority in matrimonial causes. By the time of Gratian the third principle had been settled in the sense that the Church had acquired the jurisdiction. But the first and second needed clear enunciation, and in the *Decretum* they received it.

In contradistinction to the principle of the Civil Law, '*Nuptias non concubitus sed consensus facit*,'<sup>3</sup> Gratian asserted that both *consensus* and *concubitus* were requisite. As his method was in the *Decretum*, he incorporated previous pronouncements which had

<sup>1</sup> *History of English Law*, Vol. II, p. 141 (ed. 1923).

<sup>2</sup> *The Canon Law in the Church of England*, 3.

<sup>3</sup> Ulpian, *Digest* I, 17, 30.



won authority; and here he reproduced statutes both from the *Opus Imperfectum in Matthaeum*,<sup>1</sup> which is thought to date from the 6th century, and from the *De Institutione Virginis* of St. Ambrose<sup>2</sup> in his definitions. These last are to be found in the second part of the *Decretum*, in the *dicta* appended to c. 34 and 45 respectively, under *Causa 27, Quaestio 2*:

'(1) Sciendum est, quod conjugium desponsatione initiatur, commixione perficitur. Unde inter spousum et spousam conjugium est, sed initiatum; inter copulatos ratum.

'(2) Coitus sine voluntate contrahendi matrimonium et defloratio virginitatis sine pactione conjugalī non facit matrimonium, sed praecedens voluntas contrahendi matrimonium et pactio conjugalīs facit, ut mulier in defloratione suae virginitatis vel in coitu dicatur nubere viro vel nuptias celebrare.'

Thus the theory is plain that while *coitus* cannot constitute marriage without consent, consent does not make a marriage without *coitus*. When the Canon Law disallowed divorce *a vinculo*, it provided for the annulment of marriages of which it could be shown either that in spite of *coitus* there had been a contractual defect, or that the consent had not been followed by *coitus* owing to physical failure. Marriages of the first kind were null; of the second they were matter for annulment. On the ground of an *impedimentum dirimens* a consummated marriage was null and void *ab initio*; on the ground of an *impedimentum impeditivum* a marriage would not necessarily be voided, but might be subject

<sup>1</sup> *Hom.* 32: Matrimonium enim non facit coitus, sed voluntas: et ideo illud non solvit separatio voluntatis. Ideo qui dimittit conjugam suam, at aliam non accipit, adhuc maritus est. Nam etsi corpore jam separatus est, tamen adhuc voluntate conjunctus est. Cum ergo aliam acceperit, tunc plene dimittit. Non ergo qui dimittit moechatur, sed qui alteram ducit. sicut autem crudelis est et iniquus, qui castam dimittit: sic fatuus est et injustus, qui retinet meretricem. Nam patronus turpitudinis ejus est, qui crimen celat uxoris.

<sup>2</sup> *Lib.* I, c. 6: Cum enim initiatur conjugium tunc conjugii nomen adsciscitur; non enim defloratio virginitatis facit conjugium, sed pactio conjugalīs. Denique cum jungitur puella, conjugium est, non cum virili admixtione cognoscitur.

<sup>3</sup> (C. 34). It is to be understood that marriage is begun by betrothal, but completed by union (intercourse). From which it follows that marriage between betrothed parties is initiated marriage; between those united by copula it is ratified marriage.

(C. 45.) The sexual connection without the will to contract a marriage, and the destruction of virginity without the marriage pact, do not constitute marriage, but the preceding will to contract marriage and the marriage pact do constitute marriage, so that a woman in the destruction of her virginity or by copula may be said to marry a man or to celebrate a marriage.

to temporary or local suspension owing to a temporary or local incapacity to marry. But whether a marriage had been consummated or not, a defect in the validity of the contract, owing to insanity, force, fear, or mistaken identity, all of which impediments obviously eliminated consent, nullified the marriage; and whether or not there had been consent, and even if consummation had followed, a defect in the capacity of the parties to contract marriage, owing to age, existing marriage, or relationship within the prohibited degrees, would nullify the marriage.<sup>1</sup> But while the Church added further obstructive impediments as part of its discipline, attempts were made to establish the validity of unconsummated marriages which had been the subject of valid contract, i.e. not *per verba de futuro*, or a betrothal, but *per verba de praesenti*, i.e. a marriage proper, which ordinarily required immediate copula to constitute *conjugium ratum*.

Alexander III, following Innocent II, who had so decided in a special case, sought to reverse the practice of long tradition by bringing unconsummated marriages, where impotence was not the impediment, under the rule of indissolubility. This proposal was in part a reversion to the Roman Civil Law under which *consensus*, not *concubitus*, effected marriage. But it imported the newer rule of indissolubility, and would thus have established a new principle, neither ancient Roman nor orthodox Christian, viz. the indissolubility of a marriage which had been the subject of a valid contract, but which the parties wished to sever before it had been consummated. It was obviously an innovation upon the Roman Law because it insisted on the indissolubility of the marriage; it reversed the Christian tradition because it allowed the verbal contract to constitute the marriage. Although Alexander relaxed his rigorism under pressure of (1) the claims of religious profession where persons after marriage preferred to take monastic

<sup>1</sup> The list of *impedimenta dirimentia*, as accepted by canonists since the Council of Trent, appears in the following canonical verses. They actually date from the 13th century, but this version incorporates some small Tridentine amendments:

Error, conditio, votum, cognatio, crimen,  
Cultus, disparitas, vis ordo, ligamen, honestas,  
Dissensus, et affinis, si clandestinus et impos,  
Raptave sit mulier, loco nec reddita tuto,  
Haec facienda vetant connubia, facta retractant.

These grounds are found to have fluctuated with the requirements of the Canon Lawyers. Cf. Esmein, *Le Mariage en Droit Canonique*, Vol. II, p. 203.

vows, and (2) the established tradition that physical incapacity voided a marriage, his decision so far affected the Western Church that marriages contracted *de praesenti*, and unconsummated, save in the two cases given, required Papal dispensation to dissolve them.<sup>1</sup>

We shall note in the next chapter the complications which attended the practice of Papal dispensations in the case of Henry VIII. But the work of Alexander III left a further evil legacy in the binding effect of a betrothal *de futuro* followed by consummation, without any contract *per verba de praesenti*. Alexander's legacy was the well-known scandal of the pre-contract, by which in England until Lord Hardwicke's Act of 1753 a contract *de praesenti* without consummation, or a contract *de futuro* followed by consummation, nullified a later marriage which would otherwise have been valid. The fact, of which this is the proof, is not the correctness of the mediaeval Christian conception of marriage but the establishment by the Church, and through the Church in the Law, of the necessity of the copula to marriage; for even where a contract *de praesenti* was held to nullify a future marriage, a papal dispensation would exonerate from the pre-contract. And whereas Lord Hardwicke's Act required formal marriage by banns or licence, if such marriage went unconsummated a suit for nullity would lie on the recognized grounds. The Canon Law, forbidding divorce *a vinculo*, provided annulment of those marriages which lacked the requisite conditions of marriage; and, in the absence of larger grounds of dissolution, the Canon Law nullity remains indispensable.<sup>2</sup>

<sup>1</sup> It appears, according to modern Roman ecclesiastical practice, that these marriages, valid in all respects save lack of consummation, when they are unconsummated not owing to impotence, are actually cases for dissolution and not for annulment. Being actual marriages (*conjugium ratum*) they cannot admit of annulment; but being incomplete marriages (*ratum sed non consummatum*), they can be dissolved before the copula imparts permanence. Such marriages therefore provide an exception to the rule of indissolubility of marriage. This is a development from the earlier definitions, in which *conjugium ratum* was held to imply the copula. In evidence of this development the Flemish canonist, Van Espen, could write of *matrimonium ratum* as being attained before consummation, but still employ the word '*perfectio*' to describe the effect of consummation. (*Jus Eccl. Universum*, Tit. XII, c. 4.)

<sup>2</sup> This is not to overlook the fact that annulment and dissolution are distinct processes, and that dissolution cannot be applied to a void marriage; but the introduction of wide enough grounds of dissolution under a reformed law would make possible the dissolution of voidable marriages, i.e. actually and necessarily annulment, but by the process of dissolution.

Following the definitions of a legal marriage, the principle of such a marriage in relation to divorce is crystallized by Gratian in a few crisp canons in the second part of the *Decretum* (*vide Causa 32, Quæstio 7*).

‘Vinculum conjugii fornicatione dissolvi non potest.

Nulla ratione dissolvitur conjugium quod semel initum probatur.

Sive vir ab uxore, sive uxor a viro causa fornicationis discesserit alteri ad haerere prohibetur.

Moechatur qui a viro dimissam ducere praesumit.

Adultera probata, quae viventi marito alteri nubit.

Quamdiu vivit vir licet adulter sit, licet sodomita, licet omnibus flagitiis coopertus, et ab uxore propter haec scelera derelictus, maritus ejus reputatur, cui alterum virum accipere non licet.’<sup>1</sup>

The following *dictum* is appended to canon 16:

‘His auctoritatibus evidentissime monstratur, quod cuicumque causa fornicationis uxorem suam dimiserit, illa vivente aliam ducere non poterit, et, si duxerit, reus adulterii est.’<sup>2</sup>

It will be noted how literal is the transcription of the word ‘fornication’ from the New Testament, and how blind to those difficulties occasioned by its use to which we have referred in Chapter II, *supra*. The Church at the time of Gratian had acquired a monopoly of the learning of the Western World, and was able to impose its interpretation without question until the Renaissance. The Canon Law thus gained a prescriptive right everywhere outside the Eastern Church, and the principle implicit in Gratian’s canons determined both the Church’s marriage law and the

<sup>1</sup> The bond of marriage cannot be dissolved by fornication.

A marriage once entered and approved (consummated) cannot be dissolved on any ground.

Whether the husband has departed from the wife, or the wife from the husband, for the cause of fornication, he (or she) is prohibited from uniting with another.

One who presumes to marry a woman who has been dismissed by her husband commits adultery.

A woman who marries another man during the lifetime of her husband is proved an adulteress.

If a man is an adulterer, or guilty of sodomy, or practised in every variety of vice, and owing to these offences has been left by his wife, he is still accounted her husband, and she is not permitted to receive another man.

<sup>2</sup> It is shown most clearly by these authorities, that whosoever shall have put away his wife for the cause of fornication cannot marry another while she is still living, and if he shall have so married, he is guilty of adultery.

jurisdiction of the Courts. First this principle of the indissolubility of marriage excluded all divorces *a vinculo matrimonii*, such as had always been possible even after the Church had succeeded in qualifying the Roman Civil Law to the exclusion of the ground of mutual consent. Now all grounds were excluded; and, once married, no party could escape except by death. But the Church allowed a 'divorce' of its own definition, called divorce *a mensa et thoro*, by which the parties remained indissolubly married while they were separated 'from bed and board.' The grounds of divorce *a mensa et thoro* were finally resolved under the Canon Law into the following: adultery (and unnatural offences), cruelty, and heresy and apostasy.

The second consequence of the principle crystallized by Gratian in his famous clauses was that the Church, which decreed the marriage law in principle, must also administer the marriage law in practice. From Constantine to Leo we have noted the interrupted yet growing encroachment of the Church. The fluctuations, which Gibbon remarked, 'between the customs of the Empire and the wishes of the Church,'<sup>1</sup> went heavily in favour of the Church under Justinian, reacted under Justin II, varied until the reign of Leo, and afterwards ceased to favour the State at all. The unquestioned law of the Church, proclaimed by Gratian, was confirmed by a succession of grasping Popes, who gathered under their authority the whole administration of the marriage laws which had steadily been wrested from the imperial state. Thus it was a principle inseparable from the Canon Law that only an ecclesiastical court was competent to hear and determine causes in divorce; for since only one variety of divorce was allowed—and that not a divorce at all, as divorce is known in history, but only a separation—the Church saw clearly that it must administer its own laws itself. Thus the principles emerge—and have passed for the true expression of the spirit of Christ, of which they are a perverted parody—that marriage is indissoluble except by death, that, even in the worst cases of matrimonial crime, cruelty and failure, only a separation of the parties from bed and board is permissible, that only the Church could administer its own laws, and outside the Church Courts no relief could be obtained.

It is not a third consequence of the principle implicit in this clause of Gratian's *Decretum*, but rather an article of its actual

<sup>1</sup> *Decline and Fall*, Vol. IV, p. 481.

application, that the law greatly curtailed the remedy or relief which in theory it would give to women. If a man committed all the sexual crimes in the Calendar, his wife could not escape from the marriage; and even where a decree *a mensa et thoro* was equitably due, she frequently could not obtain it. But if a married woman committed corresponding crimes, or even took the lesser liberties for which legal consequences were provided in the legislation of Justinian, the outraged husband could find a remedy. The complete divorce, which the legislation of Justinian would have given, was, of course, forbidden by the Canon Law; but the Church supported the male party and would punish erring wives by the imposition of penance or by confinement in a convent. A decree *a mensa et thoro* would not permit the husband to re-marry, but would not prevent his finding consolation with a mistress. And if the husband were worthy of consideration for his affluence, the Church's lawyers often enough could find cause for setting him free.

This encroachment of the Church upon the old liberties of the people of Western Europe was resented and resisted, and it was not uniformly successful. There are signs that when the Church was strong, its authority was sometimes evaded; and when the Church was weak, it was flouted. Nevertheless, the rule of the Canon Law remained, and was both oppressive to the people and profitable to the Church, as Mr. H. C. Lea has shown both in his own *History of the Inquisition*<sup>1</sup> and in the *Cambridge Modern History*.<sup>2</sup> For while the Church disallowed divorce on principle, the ecclesiastical lawyers encouraged litigation and promoted causes which would yield a maximum of profit to the Church and yet detract nothing from its professed spiritual authority.<sup>3</sup>

While the authority of the Church thus encroached upon the liberties of the people, it may be said also to have brought its own priests under a new discipline. The Quinisext Council had pronounced on the subject of clerical marriage, and clerical marriage survived in the Eastern Church. But it was about the time of Gratian that the marriage of priests was actually suppressed.

<sup>1</sup> Vol. III, pp. 643-4.

<sup>2</sup> Vol. I, chap. 19, esp. p. 668.

<sup>3</sup> Cf. Bryce, *Studies in History and Jurisprudence*, Vol. II, p. 826, where it is noted that while the Church used the word 'divorce' both of annulment and of separation *a mensa et thoro*, this use was incorrect, and so-called 'divorce *a vinculo*' under the Canon Law was annulment. N.B.—The only possible exception is the dissolution of a *conjugium ratum sed non consummatum*.

Hildebrand, the greatest of the Popes, who reigned at the end of the 11th century, engaged in a campaign for the establishment of clerical celibacy. Finding that appeals to the clergy failed to effect the reform, he called upon the lay folk to repudiate the authority of married priests, and his efforts were ultimately successful. In England the priests resisted strenuously; and Henry of Huntingdon, a contemporary of the event, told how, before they finally capitulated to the papal rule, they had the satisfaction of catching a papal legate, himself a fervent preacher of clerical chastity, in the arms of a courtesan.<sup>1</sup>

The spiritual authority of the Church in Matrimonial Causes rested on the literal acceptance of the alleged legislation in the Gospels, enforced by texts drawn from the Old and New Testaments, and buttressed by *dicta* of the Fathers. Erasmus in his *Colloquia* gives an impression of the position of married women before the Reformation, and suggests that the more spirited suffered through the general credulity and submission of simple folk. One woman complained of the cruelty and vicious habits of her husband to another woman who was newly married. The first said that she would sooner live with a pig, and intended to leave him. The second reproved her for such defamation of her lord and master, and said that it was not right to talk like that. The conversation ended thus:

FIRST WOMAN: 'Not right! If he does not treat me as his wife I shall certainly not look upon him as a husband.'

SECOND WOMAN: 'But Peter and Paul say that we must obey our husbands, and even Sarah called her husband "Lord."'

FIRST WOMAN: 'Oh, yes, I've heard all that before. But Paul says that husbands should love their wives, and when he remembers his duty, I shall remember mine; but not while he treats me as a servant.'

SECOND WOMAN: 'Whatever your husband is like, you ought to know that you have no right to change and get another. There used to be a remedy known as divorce, but now it has been abolished, and you will have to remain married to your husband to the end of your days.'

FIRST WOMAN: 'It must have been some infernal fiend who took that right from us.'

SECOND WOMAN: 'Be careful what you say! It was Christ who did it.'

FIRST WOMAN: 'I can hardly believe that.'

SECOND WOMAN: 'But so it was.'<sup>2</sup>

<sup>1</sup> Lecky, *History of European Morals*, Vol. II, p. 333, quoting H. C. Lea, *History of Sacerdotal Celibacy*, p. 293.

<sup>2</sup> Quoted by S. B. Kitchin, *A History of Divorce*, p. 80.

This conversation illustrates the doctrine which the Canon Law imposed on Western Europe.

'Till death us do part,' in the Prayer Book Marriage Service, states the Christian ideal of permanent union, which the parties honestly accept, and intend to fulfil. But the Canon Law turned this honourable promise of high endeavour into an irrefragable legal contract, wherein the sacramental principle was used to emphasize the disgrace of dissolution. The policy of the Canonist Lawyers was to maintain the authority of the Church over men and women alike, and to keep women in subjection to men. A charge of cruelty to a wife, alleged against a husband and proved by witnesses, was readily answered by the plea that the husband was administering necessary correction to his chattel. If the wife attempted to defend herself by force, her case could be dismissed by the Court under the rule of the Canon Law that petitioners must come to court with clean hands. The Church Lawyers had little conception of cruelty, unless it suited their policy; for even if a husband were a leper and had given his disease to his wife, this was not accounted cruelty to the wife, and she had no remedy. As Dr. Lacey writes:

'The Western Canonists . . . never moved a hair's breadth from the doctrine of the indissolubility of marriage. They insisted with so much severity on the observance of the duties of the married state, that Alexander III disallowed refusal to co-habit even with a leper.'<sup>1</sup>

In a particular case the French lawyers insisted that even if a wife took refuge in a convent to escape connection with a leper husband, she was required to return to him.<sup>2</sup>

No, they 'never moved a hair's breadth from the doctrine of the indissolubility of marriage'; but doctrine and practice present a pretty picture of inconsistency. If, as happened during the Inquisition, a wife desired to change her husband, and could prove a charge of heresy against him, she could get rid of him on that count, i.e., not by 'divorce' *a mensa et thoro*, but by his death, and then could marry another.<sup>3</sup>

Indissolubility, maintained in pretence, was violated in practice. For, even in the hey-day of the Canon Law, dissolutions under

<sup>1</sup> *Marriage in Church and State*, p. 159.

<sup>2</sup> Kitchin, *op. cit.*, p. 70.

<sup>3</sup> Lea, *History of the Inquisition*, Vol. I, p. 448.



another name were common. The Canonist lawyers found ingenious pretexts for dissolving a marriage when it suited ecclesiastical policy, as easily as they had their reasons ready for maintaining it. Adultery and cruelty were grounds only for separation *a mensa et thoro*. But if a marriage had not been consummated by sexual intercourse between the parties, owing to the incapacity of one party, then even the affection of the impotent party would not prevent a decree which treated the marriage as though it had never existed. Yet the Canon Law, which perpetrated a monstrous iniquity both between men and women and between rich and poor, did nevertheless take cognizance of the fact that a complete indissolubility of marriage was a burden which 'neither our fathers nor we were able to bear.'

The theory of indissolubility had its condition not in the ecclesiastical rite (which was much less important in the Middle Ages than it had become since the Reformation and the Council of Trent) but in the sexual relations of the parties. On Canonist principles, accepted by Gratian, marriage was effected by consent but consummated by sexual intercourse, and from that point the indissolubility of each marriage was begun. The impotence of either party therefore made marriage impossible; and to this were added absence of consent (by which marriage by a mistake could be held to be invalidated), and consanguinity (extended to include quite distant cousins, and even those whose relationship was merely 'spiritual,' e.g. sponsors at baptism).<sup>1</sup> Even espousals were held to be binding, and so established against another marriage the impediment of the pre-contract. All of these impediments provided adequate grounds for the annulment of a marriage for a sufficient payment. After annulment the parties were restored *in integrum* and were free to marry again; and the Canon Law became amenable even to the legitimizing of the children, if any, of the annulled union.

Although a nullity is not a divorce, and the Church maintained its principle of the indissolubility of marriage, the effect in a multitude of examples is the same; and it is clear that in the ages of the Church's domination its doctrine of the indissolubility of marriage did not apply to men who had both the opportunity to indulge the appetite for matrimonial variety, and the power to obtain for it legal justification. 'Society, so long as it was ortho

<sup>1</sup> Cf. Quinisext Council at Trullo, A.D. 692 *supra*.

dox and docile,' writes Mr. H. C. Lea, 'was allowed to wallow in all the wickedness which depravity might suggest. The supreme object of uniformity of faith was practically attained, and the moral condition of mankind was dismissed from consideration as of no importance.'<sup>1</sup> The same author asserts that 'the world has probably never seen a society more vile than that of Europe in the 14th and 15th centuries.'<sup>2</sup>

The existence of inherited impediments and the creation of additional impediments had yet other evil consequences in the laws of the Canon lawyers. Not only did they provide for the profitable dissolution of marriages which on principle were indissoluble, but they offered another source of revenue through the licence or permission to marry which the Church retained the right to give through its dispensing powers. Thus, once granted the vast system of impediments, annulments of marriage had their counterpart in dispensations to marry. The impediments, as we noted earlier, might be diriment or obstructive. The obstructive impediments were hardly more than instruments of ecclesiastical discipline, which led, not necessarily to the annulment of a marriage, but to its postponement. But the multiplication of impediments, which led to the frequent annulment of 'indissoluble' marriages, led likewise to the corresponding development of the practice of dispensations. For otherwise few people in a given district could have married with assurance that the marriage would remain undisturbed by allegation of the bar of consanguinity.<sup>3</sup> But the practice of dispensation is unfavourable to good law, even if it were profitable to the Canon lawyers. Yet such artificial relaxations of the law are inevitable from a system of artificial impediments, and carry the worst consequences in public estimation of the security of the law. So it is that so strong a champion of the Canon Law doctrine of the indissolubility of marriage as Dr. Lacey is found to join forces with the historian already quoted, and to write thus of the Church's practice: 'The marriage law of Mediaeval Europe was in this way brought into contempt, and lost almost all the power of ordering social life'; and again, 'It cannot be

<sup>1</sup> *Inquisition*, Vol. I, chap. 1.

<sup>2</sup> *Op. cit.*, Vol. III, chap. 9.

<sup>3</sup> Indeed, as is pointed out by Pollock and Maitland (*History of English Law*, Vol. II, p. 393, note 5), if married persons desired to part, they were unlucky if they could not find an impediment on the ground of consanguinity which would invalidate the marriage.

denied that the Mediaeval Canon Law failed miserably as a guardian of the holy estate.<sup>1</sup>

The Canon Law, as it concerned matrimonial causes, was not a credit to Christianity. In theory it was rigid where it ought to have been charitable; and in practice it was often lax when it ought to have been severe. It was designed, not in the interests of Truth and Justice, but, as Milton said, 'by the policy of the devil,' for the benefit of the Church as a temporal society, the monkish lawyers and the rich rulers of the corrupt society of the Middle Ages.

It has been said that whatever may have been the law, and the profession of the Church, marriage in Christian history has never, in fact, been completely indissoluble. Had the Western Canon Law been successful in its aims and claims, this would still be true, not because nullity was common, but because the Eastern Church never recognized the indissolubility of marriage.<sup>2</sup> Not only have the orthodox clergy been encouraged, if not enjoined, to marry before receiving their Orders, though not after, but they have been permitted to avail themselves of the Eastern law of divorce; and when a priest becomes a bishop his wife must as a condition agree to a separation. Apart from this peculiar provision, the marriage of clergy produced a more humane outlook upon the matrimonial troubles of other people than was generated under the influence of celibacy in the Western Church; and the Civil Law of Rome, as modified by the legislation of Justinian, has never been repudiated in the East. That the Eastern Church did not inherit the principle of divorce by mutual consent is due to the omission of Justin's Novel restoring it, when the Roman Civil Law was translated into Greek by the order of Leo.

Thus the variety of grounds which we cited in the last chapter provided the basis of divorce throughout the history of the Eastern Church; and the civil laws of the countries included in that communion adopted the law which the Church had preserved. The Eastern Church never held the doctrine of indissolubility of marriage, and never held that divorce had any further operation

<sup>1</sup> *Marriage in Church and State*, p. 159.

<sup>2</sup> O. D. Watkins, another determined Canonist, inveighs against the laxity of the Eastern Church, *vide Holy Matrimony*, pp. 352-362. *Vide also Stanley, The Eastern Church*, p. 197.

than to register a dissolution which had already taken place by the will or the act of one or other or both of the parties. There is to-day a fashion among Anglican Churchmen of fraternizing with the Greek Church with a view to some measure of unity. It would be well if in the course of interchange of views the English Church could realize that in the 'doctrine and discipline of divorce' the Eastern Church has much to teach the Western in the matter alike of rational good sense and of Christian charity.<sup>1</sup>

Yet the Canon Law was creditable to the ingenuity of the minds of its authors. It was a powerful factor in the ecclesiastical control of private life through the Dark Ages; it helped the Church to preserve such domestic civilization as survived the barbarian invasion of the waning Empire by bringing the invaders themselves under a discipline which they could understand; and it showed great power of endurance. No country perhaps illustrates better than England this tenacity of the Canon Law in Matrimonial Causes. It is true that for some time, at least until the Norman Conquest, it made little headway against the indigenous law of marriage and divorce, although it is possible that the Collection of Dionysius Exiguus may have found its way to some small measure of acceptance. In Anglo-Saxon England the customary law, dispensed by the King and maintained by the Church, appears to have had something in common with the Civil Law of Rome, but it was in no wise recognized by the Church on the Continent. This 'Common Law' permitted divorce on the grounds of adultery, desertion, impotence, affinity (a point on which the ancient British law had been so loose as to allow marriage with a step-mother), long absence (to be distinguished from desertion, which the Reformers afterwards defined as 'malicious') and captivity. The English Law appears actually to have gone so far as to command divorce for adultery

<sup>1</sup> To this example of an exception to the rule of indissolubility, even in the ecclesiastical sphere, may be added the fact that Christian countries have been seen to reject this rule; but *pace* Mr. O. D. Watkins (*op. cit.*, pp. 394, 427, 429), who under the influence of the Catholic revival in England treats the Western Canon Law as still binding on English Churchmen. When he writes, 'For the past 700 years the historic Churches of Western Christendom have declined to recognize re-marriage after divorce,' his apparent inclusion of the Established Church of England is to be explained by the fact that the Acts of Parliament have not received spiritual ratification in the Convocations.

and desertion. But otherwise the ground of mutual consent was the condition of the operation of the other grounds. The Penitentials of Theodore, Archbishop of Canterbury in the 7th century, permitted divorce, and re-marriage on conditions, after adultery, theft or other crime (*in furtu aut fornicatione . . . vel quocumque peccato*),<sup>1</sup> but forbade the dissolution of a marriage in the absence of mutual consent (*legitimum conjugium non licet frangi sine consensu amborum*).<sup>2</sup> This liberal law of Anglo-Saxon England remained in force until the invasion of William the Norman, when the Roman Canon Law seriously began to take root in this country. Both the *Corpus Juris Civilis* and the *Corpus Juris Canonici* followed in their turn. Actually, according to Dr. Stubbs,<sup>3</sup> the Civil Law revival preceded the Canon Law revival by about forty years on the Continent; but their operation in England was practically simultaneous; and the resuscitation of the jurisprudence of Justinian, and the codification of the canons by Gratian, supplied respectively 'the necessary procedure' and 'the necessary law.' The imposition of 'foreign' law and custom provoked English opposition. In the 13th century the King and the Barons voiced the English obstinacy against the Roman Law of legitimation, '*Nolumus leges Angliae mutari*'; and when the same King, Henry III, forbade law schools and the teaching of law in the City of London, the reference, according to Selden and Prynne, is not to Magna Carta, as Coke thought, but to the Civil and Canon Laws—especially no doubt the Canon Law. The whole body of Canon Law undoubtedly suffered a measure of conformity with English custom, but its matrimonial provisions seem to have been accepted *in toto*, and to have survived in an extraordinary measure the otherwise emancipating movements of the modern epoch. In spite of recent reforms, the main principles and practice of the Canon Law in matrimonial causes are with us still.

This is to look ahead of our next period—the Reformation—to the Matrimonial Causes Act of 1857. But it may be noted, as relevant to our consideration of the Canon Law, that in that Act the Legislature enacted (in Section 22) that 'in all suits and pro-

<sup>1</sup> *Penitential*, lib. II, xii, 8. *Vide* Haddan & Stubbs, *Councils and Ecclesiastical Documents*, Vol. III, p. 199. N.B. The Penitentials were not themselves law, but serve as an indication of the Church's attitude to the then prevailing law.

<sup>2</sup> *Loc. cit.*, II, xii, 7. *Cf. The Dooms of Aethelbert* (P. & M., Vol. II, p. 390).

<sup>3</sup> *Mediaeval and Modern History* (Seventeen Lectures), p. 347.

ceedings, other than proceedings to dissolve a marriage, the Court shall proceed and act and give relief' on the principles inherited from the Ecclesiastical Courts; and the principle of this section has been re-enacted by the Judicature Consolidation Act of 1925, in sections 32 and 103. The exceptions in these provisions, which might seem to exclude Canon Law principles in suits for dissolution of a marriage, were necessary in order to facilitate the new grounds for divorce, which broke with the Canon Law principle of indissolubility. But the principle of the indissolubility of marriage, with exceptions based on adultery alone, survives; and the Canon Law practice continued to insist that antagonism and not consent shall be the condition of dissolution. For this reason no discussion of Matrimonial Causes in the English Law of to-day can properly omit the Canon Law. Reformers may pour scorn upon the Canon Law for its chicanery, cruelty and perverted justice, yet they cannot escape it as a fact still to be faced. It may be contended that the historic Church has been the cause through the factor of repression, exaggerated concentration on sex, and the association of sex with sin, of most of the sexual evils of Christian history and the consequent revolt of to-day; and thus that the Canon Law, which was the instrument of those influences, is the continuing explanation of the frequent failure of the Court to relieve matrimonial misery. For while the present procedure facilitates the dissolution of marriages when the parties have been adequately instructed in the presentation of a case of proved adultery, the devices of the Canon Lawyers for the complication and extension of litigation, and the consequent enrichment of the mediaeval Church, provide the governing conditions of present practice. The bars to relief, which had originally been devised in order to prevent every vestige of the old Civil Law principle of divorce by consent, have been inherited from the Ecclesiastical Courts and re-established by Statute.

The long reign of the Canon Law in Matrimonial Causes is itself the sufficient explanation of this considerable reference to its work in history. But the Canon Law needs no apology on that count when it is remembered that, within living memory, Doctors' Commons—'the College of Doctors of Law exercent in the Ecclesiastical and Admiralty Courts'—formed a profession for the practice of the Civil and Canon Laws, and that once in the

University system there were Bachelors and Doctors in the Canon Law; that at Oxford, where the D.C.L. is the surviving degree, Doctorates in the Civil and Canon Laws could once be taken together, and that, most notably perhaps, at Cambridge the degree of LL.D. is explained as a survival of the two branches which were known historically as the *Utrumque Jus*.

## CHAPTER V

### EFFECTS OF THE REFORMATION

The Reformation is commonly quoted as a single movement which overthrew the authority of the Pope in certain countries, and established the era of National Churches. It is truly explained as the revolt of the new life of Western Europe, under the influence of the New Learning, against the Scholastic theology of the Mediaeval Church and the practical abuses which flourished under the Canon Law. But it took varied forms, and developed in different directions. The effect on the law and practice of marriage and divorce was not uniform even in Protestant countries; and if the succeeding survival of the Canon Law in Catholick countries be taken into account, there will be found to be four distinct effects of the Renaissance and the Reformation upon this branch of Law.

First, the modern state repudiated the authority and jurisdiction of the Church, as in Germany. Secondly, it legislated and administered the law under the direction of the Church, as in the sphere of Calvinistic influence, and even further afield through the jurists of Leyden. Thirdly, it left matrimonial practice in the hands of the Church, i.e. admitted the continuing authority of the Canon Law, as in Catholick countries. Lastly and exceptionally, in England alone it acted conjointly with the Church, assuming, with the *Ecclesiastical Polity* of Richard Hooker, the unity of Church and State. The most drastic change was effected in Germany. Luther burned the Canon Law with the words, '*Quoniam tu conturbasti veritatem dei, conturbat et te hodie in ignere istum, amen*'—'Because thou hast brought down the truth of God, He also brings thee down unto this fire to-day. Amen.'<sup>1</sup> His action was prophetic and symbolical of the national policy. Thus the Lutheran Church became in the literal sense a State Church, which is not necessarily the same thing as an Established Church. All law became Civil Law; and in matrimonial causes the old Roman Civil Law, which had ceased to operate in the Empire after the reign of Leo, was re-established. The Lutheran doctrine that the matrimonial affairs of the citizen were no concern of the Church as a legislative and

<sup>1</sup> Preserved Smith, *Life and Letters of Martin Luther*, p. 101.



judicial body, but only to be pressed *in foro conscientiae*, precisely reversed the conditions of many centuries of Canon Law. Under the Canon Law there was no conflict of Church and State on the issue, because the law was the law of the Church. Under the Civil Law of Germany there was likewise no conflict of Church and State on the same issue, because the law was the law of the State.

After the initial clash in Germany, where 'Luther broke the chain of authority and tradition at the strongest link,'<sup>1</sup> Geneva offers the outstanding example of a Protestant polity. Calvin, trained first as a lawyer and secondly as a theologian, thought more clearly than Luther and devised a system in which the Church would continue to exercise a dominating influence. Church and State were to act in concert, each in its own sphere, yet each owning the same divine authority and expressing the same fundamental doctrine. Nowhere did the Calvinistic system take a more drastic turn than in its ordering of the laws of marriage and divorce. Whereas Germany reverted to the old *Jus Civile* of ancient Rome, Geneva made new law. The theologians prescribed it; the magistrates administered it agreeably to theological authority. For marriage was admitted to be of the civil order; but since, according to the theory, the civil order no less than the ecclesiastical was 'of God,' its authority lay therefore in the Bible. The new marriage and divorce laws presented a double contrast with the Canon Law. Based on the same Scriptures, they broke with the doctrine of indissolubility; yet they corrected the laxity of the Canon Law, and disallowed the large liberty of dispensations whereby the Canon lawyers met the claims of human infirmity without deviating from the rigidity of their doctrinal principle. The Genevan theologians confidently followed the excepting clause in Matthew and established divorce for adultery on a divine basis. From divorce for adultery alone they proceeded to extend the facility, on the authority of St. Paul,<sup>2</sup> to include malicious desertion. Adultery and malicious desertion *ipso facto* destroyed the marriage; and the Court did not separate the parties by its decree, but only registered the separation which the act of one of the parties had effected. But the principle of ecclesiastical interference lingered in the duty imposed upon judges of urging reconciliation after desertion unless malice could be proved; so that the pastoral care of the clergy survived in the office of the

<sup>1</sup> Lord Acton, *Lectures in Modern History*, p. 4.

<sup>2</sup> 1 Cor. vii. 15.

civil magistrates. While, however, the guilty party was punishable as for a crime, no impediment was imposed upon re-marriage. The destruction of the marriage bond by adultery or malicious desertion set the parties free; whereas the Canon Law doctrine of indissolubility, which allowed only separation *a mensa et thoro*, condemned the separate parties to life-long celibacy which, in the Reformers' view, was contrary to the purpose of creation. Dispensations disappeared, and annulment of marriage thereafter was possible only when a marriage had been contracted without consent.

In spite of the rigidity of the reformed law, which professed to depart in no wise from the strict authority of the Scriptures, the new interpretation of the Gospels conceded much by the repudiation of the doctrine of indissolubility on the two counts of adultery and malicious desertion. The Dutch lawyers welcomed the concession of the theologians, for this took a step towards the liberties of the old Roman Civil Law which was their ideal, and vigorously promulgated the doctrine of dissolution in the place of separation by divorce until it became the accepted rule of the Reformed Church. All Protestant countries have felt the influence of the Dutch jurists at Leyden who worked on the concessions of the theologians at Geneva; and Scotland accepted the new law of divorce with the grounds of adultery and malicious desertion and has retained it ever since.

Yet, although this law was new, it must needs have some recourse to precedent other than the theological principles derived from the study of the Scriptures. The principles of theology provided the substantive law, but they did not provide the rules of evidence and procedure. For these the Courts referred to such precedents as were available, both in the *Corpus Juris Civilis* and the *Corpus Juris Canonici*; so that even where Statute Law replaced the Canon Law, the Canon Law reared its head again and carried some of its evils into the modern epoch. The Genevan theologians, sharing with the Canonists the Scriptures for authority, still regarded divorce as criminal, and prescribed heavy penalties for a guilty spouse; and the lawyers, not even excepting the more enlightened School of Leyden, borrowed from the Canon Law the bars to relief which still make divorce contingent on the mutual antagonism of married persons. The prescribed penalties became for the most part obsolete within a couple of centuries; but the Canon

Law bars continued to determine the procedure of the Courts, and still qualify, although not so strictly as in England, the vaunted facility of Scottish divorce.<sup>1</sup>

The effects of the Reformation were not confined to the countries which accepted it. Every State which remained under the Roman obedience felt the shock and suffered some change. The Counter-Reformation, which was Rome's reply, was a confession both of the wide and deep contagion of the reforming movement, and of the actual need of reform. The improved condition of the Roman Church was itself a testimony to the success of the Reformation. 'The great and rapid victories of the 16th century were won,' wrote Lord Acton, 'over the unreformed and disorganized Catholicism of the Renaissance, not over the Church which had been renovated at Trent. Rome, with a contested authority and a contracted sphere, developed greater energy resource and power than when it exercised undivided sway over Christendom in the West.'<sup>2</sup> The mediaeval system was in ruins, and the emerging idea of the sovereign state, fed by the doctrines of Machiavelli, revolutionized even in the Catholick sphere the one-time unity of Church and State with the Church as the predominant power. Churchmen sought to separate the Church from the course of political evolution. The Canon Law remained, and was administered by the clergy wherever they had the requisite power; and the continuation of the reforms of the Council of Trent only failed to follow the precedents of the past in so far as the accumulation of case-law took the place of new decretals.

The laws of marriage and divorce remained unchanged in essentials, but subject to reform in the interests of stricter control of marriage. Consanguinity and clandestine marriage both occupied the attention of the Tridentine reformers. For, in spite of the care of the Church to secure the celebration both of espousals and of the matrimonial contract in Church, the practice of Western Europe had been to attach to cohabitation the presumption of marriage. But a decree of the Council of Trent pronounced clandestinity to be a diriment impediment. A marriage contracted

<sup>1</sup> Petitioner's adultery does not act as a bar, although it may be the basis of a counter-petition; nor does delay set up a bar; but the Scottish Courts are careful to guard against collusion; and connivance, condonation and conduct conducing are defences as *lenocinium*.

<sup>2</sup> *Lectures in Modern History*, pp. 124, 125.

without the prescribed formality was therefore void. Here an objection might be urged that this decree was inimical to the sacramental essence of marriage, which lay in consent, followed by consummation. And if this objection were satisfactorily met, there remained the further consequences that (1) while for the future marriages required the presence of a priest and two witnesses, the lack of preliminaries might leave the marriage still to all intents and purposes clandestine, and (2) the presence of a priest, if only as a witness, suggested that marriage was effected by an official. Thus even the Tridentine reformers left the control of marriage incomplete, and the impression that an official effected the marriage is contrary to all sound theological principle.

Public witness of a marriage is desirable and even necessary in the interests of public order, but no ecclesiastical intervention can change the essential character of marriage. The Roman Church has been slow to amend its 'use and wont,' and the Canon Law, with the Tridentine amendments, remains the law of all who acknowledge its spiritual direction. Rome has now reformed the mercenary considerations for which the mediaeval Church distributed 'divorces' by annulment, but, while she still maintains her doctrine of indissolubility, the grounds on which a Roman Catholic can obtain a nullity necessarily remain, and incidentally are considerably larger than those which obtain under the English Law. In the Roman sphere the separation of Church and State is complete, except in so far as the law of the Church provides the law of certain Catholic countries. Spain offers an interesting exception to the general rule in the modern epoch that Erastianism is a Protestant product—at least until the recent revolution.

The fourth effect of the Reformation upon the marriage laws of Europe is peculiar to England. Here alone, among the varieties of solution, Church and State enjoyed an organic union. But the Establishment, as it has come to be known in post-Reformation times, or the National Church under the Royal Supremacy and the authority of Parliament, can with difficulty be dated. It emerged from a process of prolonged controversy. Unlike the other Churches of the Reformation, the English Church maintained a clear continuity with the past, from which, however, on some vital issues it sharply parted. 'Of all the reformed Churches,' wrote the present Bishop of Durham, Dr. Hensley Henson, 'the Church of England has retained most of the mediaeval system in its

government, its formularies and its spirit.<sup>1</sup> Yet England was ever insular; and the Reformation, which elsewhere broke with a more sudden shock, was in this country the less violent conclusion of a long-drawn hostility to foreign importations. There is no doubt that the English people resented the reign of the Canon Law and the restraints upon their liberties.

The English opposition to laws and practices of foreign origin, and especially to the Canon Law, came to a head in the reign of Henry VIII. Henry resented the Canon Law less because it was merely of foreign origin—for he made generous use of its provisions, principles and fictions—but rather because it ‘extolled the Pope immeasurably,’ and thus aided the opposition to his own supremacy. His predecessor of the 13th century, Henry III, had voiced the resentment of the country; and the kings of England seem to have had larger national support against papal encroachment than had most Continental monarchs. Already in the 13th century the papal influence in England was beginning to wane. The strength of the Common Law and the power of the English kings kept both the Civil Law and the Canon Law of Rome in but partial operation; and although this statement might perhaps suggest too general an identity and interest between the Civil and the Canon Law, it is true in effect of mediaeval England until the reign of Henry VIII. This element of identity was far from being found on the Continent, and, as we shall realize, it ceased in England with Henry’s reforms. Professor Maitland throws a clear light on the conditions:

‘Owing to the rapid development of our own English system of temporal law, the civilian who was only a civilian had never found much to do in this country, and “the civil law” seems to have been chiefly studied as a preparation for the canonist’s more lucrative science. The consequence is that we in England are apt to lump the legists and the decretists together and contrast them with “the common lawyers.”’<sup>2</sup>

Dr. Stubbs went so far as to say that Civil Law was studied as a branch of Canon Law, although not exclusively.<sup>3</sup> While, as we know, after the Norman Conquest the Roman Canon Law superseded the old marriage customs of Anglo-Saxon England

<sup>1</sup> *The Liberty of Prophesying*, p. 286.

<sup>2</sup> *The Canon Law*, p. 93. The author points out that elsewhere it was far from being the case that Civilians and Canonists were at unity. *Vide* also Pollock and Maitland, *History of English Law*, Vol. I, pp. 102, 103.

<sup>3</sup> *Mediaeval and Modern History* (Lectures), p. 357.

and maintained its hold, there was also something for the civilian to do, and this in a sphere where the Civil Law was indispensable. For in certain branches of law the English lawyers were actually dependent upon foreign sources. English insularity could produce no adequate international or maritime law, and here the English jurists borrowed from abroad. Hence the peculiarity that Probate, Divorce and Admiralty, unconnected except through their remote historical, if not actually and strictly Canonical, sources, should survive together in the jurisdiction of the same Court.

The Canon Law was the Pope's law, but if it had not exceeded its last, like the Pope himself, it would not have aroused so much opposition. As Selden wrote, 'The pope had as good a title by the law of England as could be had, had he not left that, and claimed by power from God.'<sup>1</sup> In other words, the Papacy invented the fiction of divine right to direct the politics of nations. The early stage of what has come to be known as the Reformation in England was concerned with the removal of this papal supremacy; but Henry appears to have contemplated the preservation of a non-papal Catholick Church. Henry's anti-papal offensive was not, however, the motive force which made the movement. The reform of ecclesiastical abuses had long been a conscious and crying national need; and when the King's difficulty with the Pope caused his retaliation on the Church, the country gave its support. The doctrinal reforms, which take so large a place in later history, were quite secondary and became important only in the later reigns. Thus there was a movement in being which Henry's quarrel with the Pope brought into action; and therefore it is as the actual and contemporary, as distinct from the ultimate, cause of the English Reformation that we rightly place the cause of this quarrel, that is to say, Henry's dissatisfaction with his first marriage and his failure to persuade the Pope to pronounce the marriage null and void. Our subject therefore is inseparable from the general history; and although it is properly incidental, it provides a material incident. As Professor Pollard writes:

'... there never was a flimsier theory than that the divorce of Catherine was the sole cause of the break with Rome. The centrifugal forces were quite independent of the divorce; its historical importance lies in the fact that it alienated from Rome the only power which might have held them in check' (i.e. the King).<sup>2</sup>

<sup>1</sup> *Table Talk* (ed. S. W. Singer), p. 96.

<sup>2</sup> *Henry VIII*, p. 238.

In other words, the first of Henry's matrimonial troubles was not the root cause but the occasion of the ecclesiastical breach. Although Henry accepted Canon Law principles in the earlier stages of his reign, and was indeed himself an accomplished canonist, he saw the need for the reduction of the Canon Law's authority in the later years. Yet Canon Law principles and procedure long continued to determine matrimonial causes in England; and here, in this respect, after a sharp initial struggle, the Canon Law showed a greater survival value than in other Protestant countries, and surrendered very slowly to public opinion expressed in Parliamentary encroachments upon its preserves.

The first clash came with Henry's attempt to annul his marriage with Catherine of Aragon, his deceased brother's widow, whom he had married by special dispensation from the Pope in 1509, the year of his accession to the throne. Henry's achievements of nullity in the course of his peculiar matrimonial history are commonly described as 'divorces'; but in fact under the Canon Law there was no divorce proper, although the word was used loosely both of annulments and of separations *a mensa et thoro*, which last would have been of no use to Henry. His so-called 'divorces' were annulments, even when his procedures were provided for or ratified by Parliament. His first wife, Catherine, had presented him with a daughter, Mary; but since he seemed likely to be disappointed of his hopes of a male heir, he took Anne Boleyn as his mistress, a position from which she intended to rise to that of his queen. Doubting the validity of his first marriage, and in the hope of a legitimate male heir, the King pressed the Pope for a nullity. But on political rather than on moral or canonical grounds this could not be granted. The Pope even considered the possibility of a dispensation to Henry to take a second wife. Henry obtained learned legal opinions to the effect that his first marriage by dispensation was properly void. Indeed, it appears that under the Canon Law, as then generally interpreted, such a marriage was void,<sup>1</sup>

<sup>1</sup> Such was the prevailing opinion as pronounced by the Universities of Europe; although the papal partisans maintained that whether Catherine's marriage with Arthur had been consummated or not, whether the impediment were of divine law or not, the Pope could dispense. The impediment was diriment, but it was one of those which concerned freedom to marry; and the Church can dispense in the case of some marriages within the prohibited degrees, i.e. where the impediment is held not to be of divine law and not essential to the nature and institution of marriage.

[Continued on next page.]

and by English Law it was not permissible until 1921. But while it was possible for the Pope to dispense from some diriment impediments, and it was on record that a pope had dispensed from the impediment of bigamy,<sup>1</sup> the Pope did not see his way to annul a papal dispensation, and finally in 1534 pronounced the marriage valid. But learned divines and canonists assured the King that, since his marriage with Catherine was invalidated by the impediment of affinity within the prohibited degrees, he could marry Anne with or without a 'divorce' from Catherine; but the King's desires were not satisfied by this canonical bigamy. Under persuasion from Henry the Pope had appointed a Commission to try the validity of the marriage which had then endured for all but twenty years. An Italian Cardinal, Campeggio, and Cardinal Wolsey of England were the Papal Legates. Political influences abroad caused slow progress with the suit; and papally planned procrastination, followed by the revocation of the trial to Rome, was enough to rouse the wrath of Henry, whose responding action destroyed the papal power in England.

Henry's policy was well prepared. For some seventeen or eighteen years his reign had been uneventful, but he had awakened to the possibilities of power. The Statute of Praemunire was

But the question whether Catherine's marriage with Arthur had been consummated or not—a question which was raised but is alleged to be irrelevant—suggests some interesting points. If that marriage had been consummated after *sponsalia per verba de praesenti*, it would raise the impediment of affinity against Catherine's marriage with Henry, unless before Arthur's death it had been annulled, which was not the case. But if that marriage had not been consummated, then (a) it could have been annulled on the ground of impotence (if impotence were proved), or (b) it could have been dissolved if (otherwise than on the ground of impotence) it were *conjugium ratum sed non consummatum*.

Had this marriage been annulled, the question of a dispensation for Henry's marriage with Catherine would not have arisen. Had it been dissolved, it would have been a valid marriage, and the impediment against marriage with a brother's widow would have stood. As a matter of fact the question of consummation was not settled; the marriage had not been annulled; and, although it was not dissolved by dispensation or decree, it was dissolved by death. There is no evidence that it was not a valid marriage, even if it were *conjugium ratum sed non consummatum*, and therefore the dispensation for Catherine's marriage to Henry was requisite. Therefore the contention seems to be sound that the question of consummation in this case is irrelevant. But this is, of course, quite independent of the great question whether or not the papal dispensation for the marriage of Henry and Catherine was valid.

<sup>1</sup> In the case of Henry IV of Castile, who received a dispensation to marry a second wife on condition that if she bore him no children by a fixed date he should return to his first wife (Pollard, *op. cit.*, p. 207, citing *Sp. Cal.*, II, 379).



the fount from which flowed the legislation which decided the future of England. In 1365 Parliament, under pressure of anti-papal feeling, had passed a statute supplementary to the Statute of Provisors<sup>1</sup> to prevent encroachments on English jurisdiction. This Statute was enlarged and re-enacted as the Statute of Praemunire in 1393<sup>2</sup>, whereby any procuror of any bull from Rome, or of any other process which touched the person, realm or dignity of the King, could receive a writ—*praemunire* (*premoneri*) *facias*—of outlawry, banishment, or forfeiture. Under this statute Henry retaliated on Cardinal Wolsey, who had acted as Papal Legate, on the ground of various intrigues. The spoils of confiscation gave the King a first taste of the power of the praemunire, and set him to work on the long course of evolutionary legislation which made his reign famous. His intended 'divorce' and remarriage were not favoured by the country, and the foreign political complications, naturally produced by Henry's attitude to Catherine, who was the Emperor's aunt, caused serious perturbation lest they should prejudice the English wool trade with Flanders. But Henry's treatment at the hands of the Pope outweighed any scruples which the nation felt on the count of matrimonial scandal. As Wolsey had said, if the King were to appear in a foreign Court at all, it would be at the head of a formidable army. Parliament, moreover, was incensed at a foreign suggestion that it should not be permitted to discuss the 'divorce.' The King, who had been cited to appear at Rome, had the support of the country when he attacked the Church.

Henry launched the attack in the winter of 1530-1531. He put the whole Clergy of England under a praemunire because they had accepted the late Cardinal Wolsey as Papal Legate. This measure, unjust enough because Wolsey's position had been due to Henry's desire to have the trial in England, was justified by Henry in consideration of its fruitful consequences: first because it served to show the Clergy that they were subordinate to the King, and secondly because it enabled him to extract from them and from the Commons, in return for his royal pardon, the admission of his new title as 'Supreme Head of the Church'<sup>3</sup>—'*quantum per Christi legem licet*'—and further to extort the sum of over £118,000 from the Church.

<sup>1</sup> 24 Ed. III, st. iv.

<sup>2</sup> 16 Rich. II, c. 5.

<sup>3</sup> 22 Henry VIII, c. 15; 22 Henry VIII, c. 16; 23 Henry VIII, c. 19.

The King then carried further the contest with Rome. By the Annates Bill,<sup>1</sup> Parliament withheld from the Pope the payments formerly made of the first year's income on bishopricks and benefices. The anti-clerical onslaught incidentally relieved the clergy of a burden, and removed an old-time clerical grievance. But this was but incidental, for the clergy are found surrendering their right of spiritual legislation without the royal licence, and consenting to a reform of the Canon Law under the royal authority. A year later Parliament passed the Statute of Appeals,<sup>2</sup> transferring all appeals which formerly had been sent to Rome, first to the Archbishop, or, if the case touched the Crown, to the Upper House of Convocation. The Act for The Submission of the Clergy and Restraint of Appeals,<sup>3</sup> which followed in the next year, further provided for appeal to the King in the Court of Chancery instead of, as formerly, to the See of Rome, and took in hand a drastic curtailment of the Canon Law. Not only was a Commission appointed to review the Constitutions and Canons and to exclude or annul such as were prejudicial to the Royal authority, but it was enacted that no new canons should be made or put into execution by authority of Convocation which were contrary or repugnant to the Royal prerogative. These two statutes both had a matrimonial reference, and provided that causes in matrimony should henceforth be within the King's authority. These Acts, coupled with the second Annates Act,<sup>4</sup> which included the legality of confirmation and consecration of bishops without letters from Rome, effected the complete severance from the Papacy; and the Act for the Submission of the Clergy notably set the National Church in subordination to the Royal Supremacy.

In the meantime the new Archbishop had solemnized the marriage with Anne Boleyn, and decreed the annulment of the marriage with Catherine. At this juncture, again, while Henry's matrimonial tangles troubled his subjects, his national policy won their applause. The country failed to show enthusiasm over either the coronation of the new Queen or the birth of her child; and Shakespeare's portrayal of Elizabeth's christening and Cranmer's eulogy is quite apocryphal. But Henry seems to have allayed his people's anxiety for the preservation of the wool trade; and he certainly enjoyed the overwhelming sympathy of the

<sup>1</sup> 23 Henry VIII, c. 20.

<sup>3</sup> 25 Henry VIII, c. 19.

<sup>2</sup> 24 Henry VIII, c. 12.

<sup>4</sup> 25 Henry VIII, c. 20.

country when the Pope once more played his cards to his disadvantage and issued a bull of excommunication. This sentence proved to be of insignificant importance beside the legislation which proceeded apace in England, confirming the submission of the Church and adding more power to the King.

But, in spite of Henry's acquired control, the Canon Law went unreformed as substantive law. It was, indeed, on Canon Law principles and precedents that Henry had measures passed, creating or removing impediments as required for the annulment or celebration of his marriages. When his marriage with Catherine of Aragon, itself contracted under a Papal dispensation, was annulled, the decree of nullity received the implicit approval of Parliament, which declared by its vote the invalidity of such a dispensation. The illegitimacy of Mary, Catherine's daughter, was apparently not considered, or at least was not pronounced, when the Archbishop declared the nullity. According to Canon Law principles, nullity would bastardize the children of a void marriage; but Canon Law practice would sometimes serve to legitimate them. In the event Parliament overrode any scruples which the supporters of Catherine entertained; for Henry now embarked upon his famous phase of legislation for the Succession of the Crown. Having invoked on Canon Law principles the Levitical impediments (Lev. xviii), he proceeded to secure the limitation of the relevant impediment (verse 18) to consummated marriages—for otherwise his own relations with Anne's sister, Mary, would have barred his marriage with Anne; and in 1534 the succession was settled on the King's heirs male, and in default on the Princess Elizabeth.<sup>1</sup> But when Anne in her turn disappointed him by failing to produce a male heir, he had the impediment of illicit intercourse with the sister of a wife restored.<sup>2</sup> This enabled him to effect the annulment of his marriage with Anne, and so to exclude as well his second daughter, Elizabeth, the child of Anne, as his first daughter, Mary, the child of Catherine, from legitimate succession. Anne's removal was thus effected by nullity on the ground of Henry's intercourse with her sister, Mary; although the ground of her pre-contract with Lord Percy was also alleged. Her adultery, sometimes doubted, but held to have been proved on a charge of incest with her brother, the Earl of Rochford, was not, and under Canon Law could not be, the

<sup>1</sup> 25 Henry VIII, c. 22.

<sup>2</sup> 28 Henry VIII, c. 7.

ground of nullity, but only of separation; but it was on the ground of this offence that she was condemned to death, and she went to the block with light-hearted courage.

The succession having been settled, by the Act last cited,<sup>1</sup> on the male issue of Henry and his third wife, Jane Seymour, or any future wife, his new Queen bore him a son, the future Edward VI, and died a natural death. His next marriage, undertaken on political grounds which prompted Cromwell to promote a German alliance, was unsatisfactory to him from the outset. Anne of Cleves was so distasteful to Henry that he would have escaped from the marriage even on his wedding day. His attempt to repudiate the marriage on the ground of her alleged pre-contract with the Earl of Lorraine was followed by an annulment on the ground of the non-consummation of the marriage owing to (a) Henry's lack of inward consent, (b) his expectation that Anne would be released from the pre-contract, on which account he professed to have withheld from consummation, (c) his repugnance which gave countenance to his abstinence. Since Anne expressed her readiness to agree to the proposed annulment, the effect of the procedure was not unlike that of a dissolution on the ground of mutual consent. The annulment, promulgated in Convocation, was confirmed by an Act of Parliament for the dissolution of Anne's 'pretended' marriage.<sup>2</sup> Anne escaped with her 'one neck,' and she and Henry appear afterwards to have been on friendly terms.

But the allegation of pre-contract was a dangerous precedent which might be made to apply to Henry's own intended marriage with Catherine Howard; and in the same year, 1540, Parliament came to the rescue with an Act which provided that pre-contract should be no impediment to marriage; and pre-contract was to include not only espousals *de futuro*, but marriages *de praesenti* which had not been consummated. The Act pronounced lawful the marriages of all persons who were 'not prohibited by God's law to marry'; it provided that such marriages should be 'by authority of this present Parliament aforesaid deemed, judged and taken to be lawful, good, just, and indissoluble'; and it added that 'no reservation or prohibition, God's law excepted, shall trouble or impeach any marriage without the Levitical decrees.'<sup>3</sup>

The removal of the newly married Catherine Howard in her turn raised no serious point of constitutional or canonical difficulty,

<sup>1</sup> 28 Henry VIII, c. 7.    <sup>2</sup> 32 Henry VIII, c. 25.    <sup>3</sup> 32 Henry VIII, c. 38.

and Henry's last wife, Catherine Parr, outlived him. Thus, while the Canon Law, in default of any other, was in constant demand, Henry and his acquiescent Parliament played fast and loose with it. It provided both material in law and precedents in practice for the matrimonial purposes of Henry and his Parliament, but outside matrimonial causes it ceased to be of more than antiquarian interest. The study of the Canon Law was forbidden in the Law Schools of the Universities, where Henry encouraged and endowed the Civil Law, and it was banished from the general operation of justice. Thus, thanks to Henry, the mediaeval depression of the Civil Law was lifted, and 'the unhallowed civilian usurped the place of the canonist on the bench.'<sup>1</sup>

'The unhappy, most unhappy history of his wives,' in the phrase of Dr. Stubbs,<sup>2</sup> may easily take too large a place in any estimate of Henry's reign, although it is, of course, the relevant part of the history for the purposes of this chapter. But it is right perhaps to qualify the strange impressions which may be made on the reader of Henry's matrimonial eccentricities by the *caveat* of the same learned Bishop:

'No absolutely profligate king could have got into the miserable abyss in which we find Henry struggling during the latter half of his reign.'

To this we should add the great constructive work of this 'strong, high-spirited, ruthless, disappointed, solitary creature,' in the interests of the New Learning, the new Nationality, and the Imperial mission of England. Henry founded the Regius Professorships at the ancient Universities, and equipped the English Navy to find its way in the sea and its 'paths in the great waters.' Even his matrimonial exasperations had a constructive aspect, and were ultimately productive of beneficent result. For although the early attempted reforms were to prove abortive, the Canon Law, after its conflict with Henry, never wholly recovered its previous power in England.

Henry's Acts (25 Henry VIII, c. 19; 27 Henry VIII, c. 15; 35 Henry VIII, c. 16) had aimed at a curtailment and revision of the Canon Law, specifically including causes in matrimony. After Henry's death a further Act in 1549 (3 & 4 Ed. VI, c. 11) renewed the policy and appointed a Commission. In the second year of Edward VI great part of the Act of 1540 (32 Henry VIII,

<sup>1</sup> Maitland, *loc. cit.*

<sup>2</sup> *Op. cit.*, pp. 333-334.

c. 38) relating to Precontracts and Consanguinity had been repealed by 2 & 3 Ed. VI, c. 23; and when the Commission produced the *Reformatio Legum Ecclesiasticarum* in the same reign, no reform was actually effected. This abortive *Reformatio Legum* proposed that decrees of divorce should be granted in the Ecclesiastical Courts on the grounds of adultery, desertion, long absence, cruelty, an attempt on the life of one of the spouses by the other, or deadly hatred between them; but it did not include incurable disease as a ground for divorce. It equalized the grounds as between the sexes, and allowed the right of re-marriage after divorce, but placed the guilty party at a disadvantage by imposing the severe penalties which figured in all the Reformed legislation of the period. The proposed reform did not go beyond the contemporary practice of the Reformed Churches, except in adding deadly hatred as a ground and in replacing separation by complete divorce. The Commission made the following observation on Separation *a mensa et thoro* (*vide De Adulteriis et Divortiis*, c. 19):

'It was formerly customary in the case of certain crimes to deprive married people of the right of association at bed and board, although in all other respects the marriage tie remained intact; and since this practice is contrary to the Holy Scriptures, involves the greatest confusion, and has introduced an accumulation of evils into matrimony, it is our will that the whole thing be, by our authority, abolished.'

The intention of the *Reformatio Legum* was to revise the Canon Law, but to retain the Ecclesiastical Courts and procedure. Edward VI approved it, but although the House of Lords gave it a first and second reading, the House of Commons appears not to have entertained it on account of its ecclesiastical source. Archbishop Cranmer presided over the Commission and had a number of divines in collaboration with him. Such ecclesiastical influence provoked the prejudice of the Commons, who resented the encroachment of spiritual jurisdiction, Papist and Protestant alike.<sup>1</sup>

<sup>1</sup> Such is the suggestion of Strype in his *Memorials of Cranmer* (p. 138 f.). Hallam (*Constitutional History*, second edition, Vol. I, pp. 138-140) thinks that the undue severity of much of the *Reformatio Legum* would not have been tolerated, and rejects Warburton's explanation that the old canon law was more favourable to the prerogative of the Crown.

From the repeated failure of this project in Henry's reign, its abortive progress at Edward's death, and the failure of its revival in the reign of Elizabeth, Sir Lewis Dibdin drew the reasonable conclusion that it never seriously commended itself to English Churchmen (Royal Commission, Minutes of Evidence,

But although the intended reform was abortive, and the prejudice of Parliament caused the continuance of the Canon Law as the Law of the Realm in Matrimonial Causes, the result was not entirely reactionary. Thanks to Henry VIII's own matrimonial changes and the Acts of Parliament by which he secured them, 'divorce' was 'in the air.' There were those who availed themselves of Henry's acts to obtain it on some frivolous grounds which the Canon Law had commonly permitted, but which a seriously reformed legislation would seek to restrict or at least carefully to condition. Thus, although Parliament rejected the ecclesiastical reforms, and even contemplated a bill for the punishment of adultery by death, it became amenable to the needs of private persons who could pay the costs of legislation. The case of the Marquis of Northampton, who obtained in the Ecclesiastical Courts in 1542 a 'divorce' *a mensa et thoro*<sup>1</sup> on the grounds of his wife's adultery and applied for re-marriage, provides an example of the growing liberality of opinion both in Church and State. The question of re-marriage was considered by a court of bishops, the majority of whom, headed by the Archbishop, pronounced in favour of the propriety of his re-marriage; and after he had successfully married in 1547, he obtained a private Act<sup>2</sup> which pronounced him to be 'seperate divorced and at libertie by the Lawes of God to marrye.' That this Act was repealed in the next reign in no wise detracts from the evidence of growing demand for divorce and Parliamentary readiness to take favourable cognizance of such demand. Even if the records did not provide the evidence of a growing tendency to re-marriage, the efforts of the Bishops, notably in the reign of Elizabeth, to discourage the practice would furnish it. The intervening reign of Mary restored the rule of the Canon Law. This short-lived Catholic *régime* disallowed divorce, and yet had no scruple in compelling the separation of married clergymen whose wives were described as their 'women.'<sup>3</sup> This policy, intelligible to the canonist, but both inconsistent and inconsiderate in the minds of Englishmen,

Vol. III, Q. 34,942, esp. XXXVIII). This learned authority detected the influence of Continental Protestantism; but it has to be remembered that the *Reformatio* contained much beside the section *De Adulteriis et Divortiiis*.

<sup>1</sup> Burnet, *History of the Reformation*, Part II, Book I, p. 56.

<sup>2</sup> 1551-2, 5 and 6 Ed. VI, c. 2.—N.B. The MS. of this Act is at the Record Office.

<sup>3</sup> *Vide* Q. Mary's Articles, 1554, *Item* (9).

did not commend the revival of papal power, and added to the indignation produced by the Marian persecutions.

The reign of Elizabeth, which took a mediating course in general ecclesiastical policy, provided the settlement, under which, with some amendment, the National Church survives. It failed to satisfy Papists and Puritans on either hand, but need not have led to the Puritan revolt and the Civil War, had the succeeding reigns of the Stuarts not carried intolerance to greater extremes. The Elizabethan settlement, effected by the Acts of Supremacy<sup>1</sup> and Uniformity<sup>2</sup> of 1559 and consolidated by the resolute policy of the reign, strengthened the National Church among all save the extreme factions of enthusiasts whom the 39 Articles were, in Paley's judgement, intended to exclude if they refused to conform.<sup>3</sup> But it involved incidentally a reaction in the matter of the Marriage Law, and, as we shall note, it enabled the Bishops to adopt a policy of misdirected rigour in the control of matrimonial practice. The Act of Supremacy<sup>4</sup> provided that so much of the Act of 1540 as had not been repealed, i.e. the clause limiting impediments without the Levitical decrees, should remain in force. This was no great concession to the cause of reform, which had gained ground until the accession of Mary. But since Elizabeth's revival of her father's legislation did not include the two Acts repealed in 1554<sup>5</sup> which had rendered illegitimate the succession of her sister Mary and herself, this fragment relating to impediments was all that remained of Henry's enactments in Matrimonial Causes. The rest of the reign produced no more statutory legislation either in furtherance or in restraint of divorce; but since divorce continued to be obtained, the Archbishop issued Admonitions in 1563 against re-marriage after divorce. The relevant Admonition was confirmed in 1571 to include the case of the wife's sister, and to provide for dissolution of unlawful marriage by Episcopal authority; and was further confirmed in 1604 (the year of the famous canons) when all marriages within the extended degrees were pronounced incestuous.

This new Canon Law revived the illegitimacy of Elizabeth, although its promulgation left her personally unperturbed. But there was a conflict between the Canon Law of the Archbishop's

<sup>1</sup> 1 Eliz. c. 1.

<sup>2</sup> 1 Eliz. c. 2.

<sup>3</sup> Works: *Moral Philosophy* (ed. 1833), p. 60.

<sup>4</sup> 1 Eliz. c. 1, s. xi.

<sup>5</sup> By 1 & 2 Philip and Mary, c. 8.



and the practice of the Civil Courts. The Courts held that the impediment promoted by illicit intercourse with a wife's sister was not good law, because the Act of 1536,<sup>1</sup> which restored that impediment, had been repealed by the Statute of Philip and Mary, just cited. It was, however, discovered, but not until the reign of Charles II, that the part of the Act of 1540 which had been confirmed by 1 Elizabeth c. 1, s. xi, had by reference revived the Act of 1536 and so rendered that impediment statutory.

The point may seem to be academic; and statutes of merely academic interest which go unrepealed become obsolete by desuetude. If after nearly a century this impediment was found to have been statutory all the time, it neither affected the legitimacy of persons who were dead, nor seriously impeded the progress of reform. For in the meantime the Civil Courts continued to restrain the rigorous spiritual jurisdiction over marriage. Parliament also exercised itself in the interests of a larger tolerance, and furnished a notable example in the first year of James I. Bigamy, which literally signifies no more than being married twice, carries in law the meaning of simultaneous marriage with two or more wives. It was formerly an ecclesiastical offence, of which the Civil Court took no cognizance. But in the first year of James I Parliament passed a statute<sup>2</sup> making bigamy a felony punishable with death. On ecclesiastical principles divorce did not dissolve a marriage, and therefore the marriage of a divorced person would have been bigamous. But Parliament provided that persons who had been divorced should escape the operation of the Act, and this exception was cited with effect as a precedent sixty-six years later in the debate on the divorce of Lord Roos. This statute, repealed and re-enacted in 1829,<sup>3</sup> survived in the Offences against the Persons Act, 1861,<sup>4</sup> under which, of course, divorce remained a good defence. In spite, therefore, of the continuing reign of the Canon Law, the temper of the country, expressed through its representatives in Parliament, was favourable to the more liberal outlook of the Reformed Churches. Milton, advanced beyond his Age, and writing in terms which express some of the convictions of 20th-century Reformers, saw the issue more clearly than the Puritan legislators; but when he would so far insist on the substance of marriage to the exclusion of the form as

<sup>1</sup> 28 Henry VIII, c. 7.

<sup>3</sup> 9 Geo. IV, c. 31.

<sup>2</sup> 1 Jac. I, c. 11.

<sup>4</sup> 24 & 25 Vict. c. 100, s. 57.

to remove matrimonial causes from constituted courts to the court of the conscience, he goes beyond the sphere of Divorce Law Reform, for he would reform the Law out of existence. Milton, moreover, was not alone. Milton's *Doctrine and Discipline of Divorce*, and Selden's *Uxor Hebraica*, which explored the Jewish laws of Divorce, at once reflected the tendency, and influenced the course, of their times. The larger views took a stronger hold as the century advanced. The Long Parliament, which triumphed over both Church and Monarchy, began in 1644 to reform the marriage law in the direction of the general Reformed principles and practice; and a further Act of 1653, ten years after Milton's classic work, took the further step of making marriage purely secular. Although the Restoration of the Stuarts re-established the Canon Law in England, the efforts of the Reformers had not been entirely wasted; for both Parliamentary, and even, in a measure, Episcopal influence were opposed to the domination of Canon Law principles.

Evidence of this tendency was apparent in the case of the divorce of Lord Roos in 1669. Within ten years of the restoration of the Canon Law, the Spiritual Courts granted him a decree of 'divorce' on the ground of his wife's adultery. Such 'divorce' was not divorce as understood in history and present law, but the Canon Law variety which meant only separation. But Parliament entertained a Bill to authorize his re-marriage; and the narrow majority in his favour in the House of Lords included two of the Bishops. It has been observed that the debate involved more theology than law. Both sides in the debate figured as in some measure Reformers; for while the advocates of the re-marriage contended for dissolution by divorce, because on Reformed principles adultery *ipso facto* dissolves a marriage, the opponents of the Bill, professing to stand by the Canon Law of the Church, argued on the injustice of the inequality of the sexes, which still remained a flaw in the Reformed legislation. For the Reformers required in a suit by a wife the proof of more than adultery by her husband, and placed difficulties in the way of the re-marriage of the guilty party (almost invariably the wife) by the imposition of penalties. The House of Commons, after another long debate, gave the Bill a larger majority than did the Upper House. Parliament therefore validated the re-marriage.

Thus while the Canon Law remained in force, and the Church

through the Bishops controlled marriage, Parliament would step in for the benefit of private persons, following the precedents of Henry VIII and that of the Marquis of Northampton in the reign of Edward VI. The case of Lord Roos became a new precedent for private Acts of Parliament; and, pending the Matrimonial Causes Act of 1857, still more than a century and a half ahead, the private Act of Parliament was the only course open to Englishmen, unless they transferred their domicile to Scotland.<sup>1</sup>

But another course, which could offer means of evasion of the law, and had ever been a *bête noir* to the Bishops, as witnessed by Archbishop Parker's Admonitions, was clandestine, or secret, marriage. While the Canon Law reigned without civil challenge in Matrimonial issues, as in the pre-Reformation times, the Church had maintained an effective control. Yet it was then held that a contracted and consummated marriage was valid without solemnization in Church. The Council of Trent decreed that marriages required the presence of a priest and two witnesses; but, as we have noted, this condition did not entirely exclude clandestine marriage, because it did not require preliminary investigation or public proclamation of intention. In England the clash of the Reformation caused a measure of confusion, and the Civil Lawyers devised the doctrine that a valid marriage demanded the presence of a cleric in Holy Orders. It was probably in the 17th century that this idea began to grow; it may have been due to the Courts of Chancery owing to difficulties of dower, or perhaps to the Criminal Courts which would take cognizance of charges of bigamy only when marriages could be substantiated as overt acts. The result was that, although consent of the parties was sufficient to constitute a true marriage, the lawyers demanded evidence before they held a marriage to be effectual in law. By a statute of William III, Parliament, in order to raise money for the wars, provided for the registration and rating of marriage by the parish clergy; therefore those who desired to evade this tax and those who sought to regularize irregular unions had recourse to extra-episcopal Church buildings, or to clergy who were in prison for debt. Numbers of marriages were celebrated in these doubt-

<sup>1</sup> Dillon's case, 1701, is especially notable as the first in which the House of Lords, as a Legislative body, functioned as a judicial court with counsel and witnesses.

<sup>2</sup> 6 & 7 Will. III, c. 6.

ful circumstances; and in spite of the threat of fines, which had little restraining effect on clergy who already were debt-ridden, the scandal became so serious that in 1753 the Lord Chancellor, Lord Hardwicke, succeeded in suppressing it with his Bill for the better preventing of clandestine marriages, which passed into law after considerable debate, and has always been known as Lord Hardwicke's<sup>1</sup> Act. Its provisions were more drastic than those of the Council of Trent, for it required not only the presence of a priest and two witnesses, but also solemnization in the church of one of the parties after publication of banns. In the absence of these conditions any marriage was 'null and void,' except only for the right of the Ordinary to dispense with banns and of the Archbishop to dispense by special licence. It also annulled marriages and unions contracted in defiance of the dissent of parents, and abolished the abuse of the clandestine pre-contract, by providing that 'in no case whatsoever shall any suit or proceeding be had in any ecclesiastical court in order to compel a celebration in *facie ecclesiae* by reason of any contract of matrimony whatsoever whether *per verba de praesenti* or *per verba de futuro*.' As we noted under *The Canon Law* (Book I, Chapter IV), marriages contracted *de praesenti* but unconsummated, and marriages contracted *de futuro* followed by consummation, had frequently been held to be valid and to nullify a future marriage contracted in due legal form. From the date of this Act the solemnization of any marriage otherwise than allowed by law was a felony, saving only four exceptions: marriages of (1) members of the Royal Family, (2) Quakers, on both sides, (3) Jews, on both sides, and (4) persons overseas.

This Act carried further the idea propagated by the Council of Trent, although opposed to sound theological principle, as we saw (*supra*), that marriage is effected not by the consent of the parties but by the act of an official. For now not only the presence of a clerk in Holy Orders was required, but also his active part in the proceedings; and the official presence and participation of the Established Clergy were necessary to the marriage of dissenters. Lord Hardwicke's Act was repealed and re-enacted in 1823,<sup>2</sup> with the modification that a marriage in unwitting disregard of the law would not be void. But the grievances of Roman

<sup>1</sup> 26 Geo. II, c. 33.

<sup>2</sup> 4 Geo. IV, c. 76.

Catholicks and other Nonconformists were not removed until the later Marriage Acts, of which the first was in 1836,<sup>1</sup> under which their marriages were permitted in registered buildings.

Thus, clandestine marriage being effectively eliminated, a complete divorce remained obtainable only by a private Act of Parliament. As we have noted, there were many such Acts following the precedent of Lord Roos. The procedure was to obtain a separation *a mensa et thoro* in the Ecclesiastical Court, which gave no right of re-marriage, and indeed demanded an undertaking (in fact quite nominal) on the part of the plaintiff not to re-marry. This was followed by an action for damages against the wife's paramour. The plaintiff then sought the promotion of a private Bill which necessarily must originate in the House of Lords, where the Bishops, who controlled the country's matrimonial affairs, had charge of it. The private Bill for divorce was, in fact, a Bill to secure the right of re-marriage; for without that right it would not be a divorce proper, and no man would go to the trouble and expense of such proceedings if they would only commit him to celibacy. Therefore, a clause, invariably inserted in the Bill, to the effect that the plaintiff undertook not to re-marry again, was invariably struck out, with episcopal acquiescence. In the case of the Duke of Norfolk's divorce in 1700 some exceptional objection was felt and expressed; but it would be hard on plaintiffs to reject their Bill at the end of such long, tiresome and expensive procedure. Indeed, between 1715 and 1775 some sixty of these Private Acts were passed; and between 1800 and 1850 the number increased to ninety. But the high costs confined them to wealthy people, and legal conditions for the most part rendered them unavailable to women. In four cases only were women recorded as petitioners in such proceedings, and in these the husband's adultery was aggravated by bigamy or incest. Divorce by private Act of Parliament defeated in a measure the tyranny of the continuing Canon Law in a world weary of ecclesiastical injustice, but only in a measure, and only for rich and privileged people; and the cost and clumsiness of this procedure became ridiculous in the light of Mr. Justice Maule's ironical judgement in the case of an agricultural labourer charged with bigamy at the Assizes in 1844:

'Prisoner at the bar, you have been convicted of the offence of bigamy, that is to say, of marrying a woman while you have a wife still alive,

<sup>1</sup> 6 & 7 Will. IV, c. 85.

though it is true she has deserted you, and is living with another man. You have, therefore, committed a crime against the law of your country, and you have also acted under very serious misapprehension of the course you ought to have pursued. You should have gone to the Ecclesiastical Court and there have obtained, against your wife, a decree called *a mensa et thoro*. You should then have brought an action in the courts of common law, and recovered, as no doubt you would have recovered, damages against the man who injured you. Armed with these decrees, you should have approached the legislature and obtained an Act of Parliament, which would have rendered you free to marry the person you have taken upon yourself to marry with no such sanction. It is quite true that these proceedings would have cost you perhaps five or six hundred, or a thousand pounds, whereas you probably have not as many pence. But the law knows no distinction between rich and poor. The sentence of the Court upon you, therefore, is that you be imprisoned for one day, which period has already been exceeded, as you have been in custody since the commencement of the Assizes.'

But agitation for reform was afoot, and those who desired it had not long to wait for the Act of 1857. Thanks, however, to ecclesiastical prejudice and Victorian propriety, the Act and its consequences were not so revolutionary as its contemporaries supposed. The statutory break with the doctrine of indissolubility by the adoption of the ground of adultery, which had been recognized in the Parliamentary procedure, registered a change in the substantive law; and the substitution of Statute Law administered in the Crown Courts for Canon Law administered in the Ecclesiastical Courts was not only a change in name but an improvement in efficiency, despite the high regard in which some of the judgments in the old Ecclesiastical Courts, notably those of Lord Stowell and Dr. Lushington, are rightly held.

Subject to these changes of fact and title, the legislators carried the principles and procedure of the Canon Law into the new Court. The results, saving only the relief which has been given on the ground of adultery, and that often in unavoidable circumstances of chicanery, have satisfied neither the advocates nor the opponents of Reform. The mediaeval condition of the English Law in Matrimonial Causes could not be more strongly emphasized than by statement of the fact that the opponents of Marriage Law Reform now cling to the once revolutionary Act of 1857 as a corner-stone of conservatism.

## CHAPTER VI

### THE NEW LEGISLATION IN ENGLAND

*From the Matrimonial Causes Act 1857<sup>1</sup> to the Judicature (Consolidation) Act, 1925.<sup>2</sup>*

#### THE CHANGES OF 1857

The Matrimonial Causes Act of 1857 effected a vast alteration in principle by transferring jurisdiction in Matrimonial Causes from the Church to the State. It amended the substantive law in one important point by allowing complete divorce on the ground of adultery, i.e. divorce not in the Canon Law definition of separation, but in the properly historical and legal sense of dissolution, with the right of re-marriage. But while on these counts the Act was received with widespread apprehension, it neither fell upon the country without preparation and warning, nor produced, when it came into force, any sudden rush to the new Divorce Court. Objection to the new Act was not greater than the dissatisfaction with the Ecclesiastical Courts which it displaced. For many years a growing discontent had been promoting agitation, and issued in the appointment of a Commission in 1850 to enquire into the law which those Courts administered. In 1853 the Report stated that while marriage could not legally be dissolved by any Court, the offence of adultery was adequate justification of the dissolution of a marriage on the principles alike of reason and of religion. On these principles Parliament had already legislated in many cases, and had, in fact, established the practice of dissolution by divorce on the ground of adultery. Thus the Act of 1857, which followed the recommendations of this Commission, set up a new Crown Court in place of the Ecclesiastical Courts. It enacted as Statute Law, to be administered by the new Courts for the general benefit the ground for divorce which under the previous Parliamentary procedure had been available only as a privilege of the rich. The Parliamentary debates were instructive. That in the House of Lords was notable for the analytical skill of Lord Lyndhurst, a former Lord Chancellor, in

<sup>1</sup> 20 & 21 Vict. c. 85.

<sup>2</sup> 15 & 16 Geo. V, c. 49.

answering theological objections, and for his forcible and progressive arguments in favour of a more drastic revision of the law in conformity with the practice of other countries. It is not uncommonly supposed that the Bishops were united in opposition to the Bill; but, in spite of some episcopal opposition, the Archbishop of Canterbury, the Bishop of London, and others, nine in all, voted for the Bill. In the House of Commons, the vigorous criticism of Mr. Gladstone, who at once disliked the Bill on ecclesiastical principles, and advocated a more drastic reform on the grounds of feminism, was successful in extorting some concessions from the Government, but did not prevent the Bill's passage into law.<sup>1</sup> This Act of 1857, so far-reaching in constitutional principle, yet so temperate in treatment of substantive law, remains with some amendments the law of England to-day. The really drastic change, by which the Act removed Matrimonial Causes from the jurisdiction of the Church, only inaugurated a system which we accept as normal. The incorporation of the ground of adultery alone as a ground of dissolution of marriage, now extended to equality between the sexes, leaves us marvelling at the strange timidity of politicians in the face of religious fanaticism, and at the fickle obstinacy of ecclesiastics who are opposed to all divorce, yet ready to vote for any extension of it within the limits of a text in Matthew.

Subject to this one statutory change in the law on the precedent of Parliamentary Private Bills, and to the necessary correlative legislation, the Act of 1857 was nothing but a mass of Canon Law converted into statutes and adapted to the new judicial situation and the new conditions of dissolution, at the relevant points. The scope of this Act and its successors will require careful examination.

<sup>1</sup> Mr. Gladstone's criticism of the Bill in many speeches on the grounds of its unfairness to wives seems to have led some divorce reformers to include him in the category of the champions of reform (cf. S. B. Kitchin, *A History of Divorce*, chap. ix, pp. 171-208). On private and ecclesiastical grounds Mr. Gladstone was vehemently opposed to the Bill, and attacked it from both the ecclesiastical and the social aspects. Holding the doctrine of indissolubility, he opposed from the ecclesiastical point of view the re-marriage of *divorcés* in the churches of the Establishment; and from (what is best described as) the Christian social aspect he regarded the inequality between the sexes as immoral. In the view of the Prime Minister, Lord Palmerston, Mr. Gladstone only exhibited 'the old standard set-up form of objecting to any improvement, to say that it does not carry out all the improvements of which the matter in hand is susceptible' (*vide Morley's Life of Gladstone*, Vol. I, pp. 571-572).



But the structure of the Act needs no analysis; and the history of the Court has produced only technical changes in title and in the powers of judicial personnel, in accordance with the general effect of the Judicature Acts.

### THE COURT

The Judges of the newly constituted 'Court for Divorce and Matrimonial Causes' (s. 6) were to be the Lord Chancellor, the Lord Chief Justice of the Court of Queen's Bench, the Lord Chief Justice of the Court of Common Pleas, the Lord Chief Baron of the Court of Exchequer, the senior puisne Judge for the time being in each of the last-mentioned courts, and the Judge of H.M. Court of Probate constituted by any Act of the present session (s. 8).

The very titles of these judges and their courts of jurisdiction show that at the time of the Matrimonial Causes Act of 1857 English Justice was still being administered under what must be called the mediaeval system. For, apart from the legislation of 1857, the Courts enjoyed but little reform between Edward I and the Judicature Acts. After the constitution of the Court of Probate in 1857 and the Court for Divorce and Matrimonial Causes in the same year, the number of superior courts of first instance was no less than twelve, i.e. reckoning the independent Courts as four.<sup>1</sup> When the Legislature addressed itself to the revision of the system, its first achievement was the Judicature Act of 1873,<sup>2</sup> which reduced the Courts to five, viz. Chancery, King's (then Queen's) Bench, Common Pleas, Exchequer, Probate, Divorce and Admiralty, together with the Court of Bankruptcy and the Chancery Court of Lancaster, which were left untouched and remained separate from the High Court of Justice. But by an Order in Council in 1880 the King's Bench, Common Pleas and Exchequer Divisions were merged into the King's Bench Division of the High Court of Justice, which High Court then consisted of the Chancery, King's Bench and Probate, Divorce and Admiralty Divisions. In 1883, by the Bankruptcy Act,<sup>3</sup> the Court of Bankruptcy was

<sup>1</sup> The Chancery Court of Lancaster, the Court of Common Pleas at Lancaster, the Court of Pleas at Durham, and the Court of the Stannaries in the Duchy of Cornwall.

<sup>2</sup> 36 & 37 Vict. c. 66.

<sup>3</sup> 46 & 47 Vict. c. 52.

merged in the King's Bench Division of the High Court, and the Chancery Court of Lancaster alone remained independent.

This development and consolidation of the High Court plainly affected the new Divorce Court, and the citation of its new title has anticipated enquiry into the changes which were early effected. The herald of this reconstruction of the superior courts was the Probate Act of 1857,<sup>1</sup> by which jurisdiction over wills was transferred from the Ecclesiastical Courts to the Crown. Under the Matrimonial Causes Act of the same year (s. 9) the Judge of this Court of Probate became the Judge Ordinary of the new Court; but his powers did not include hearing and determining petitions for dissolving a marriage or for nullity of marriage, or other matters which required (s. 10) three or more Judges of the same Court, of which the Judge of the Court of Probate should be by one. These disabilities of the Judge Ordinary were removed by the Matrimonial Causes Act, 1860,<sup>2</sup> and further, by the Judicature Act, 1873<sup>3</sup>, the Judge Ordinary and the Judge of the then High Court of Admiralty were established as the Judges of the Probate, Divorce and Admiralty Division. The clauses (8, 9, 10), cited from the Matrimonial Causes Act, 1857, and displaced by the Judicature Act, were all repealed by the Statute Law Revision Act, 1892,<sup>4</sup> where they had not already been repealed in whole or in part by the Statute Law Revision Act, 1875.<sup>5</sup> The Judicature (Consolidation) Act, 1925 (s. 4), repealed the Judicature Act, 1873,<sup>6</sup> s. 31, together with others, and re-enacted the constitution of the Probate, Divorce and Admiralty Division, consisting of a President and two puisne Judges.

### THE SCOPE OF THE ACT

The next point for consideration is the scope of the Act; what causes could the new Court hear? The Court took over the whole of the jurisdiction of the Ecclesiastical Courts and of ecclesiastical persons in causes, suits and matters matrimonial, except in respect of marriage licences, which remained, and remain, under the authority of the Archbishops and Bishops.

<sup>1</sup> 20 & 21 Vict. c. 77.

<sup>3</sup> 36 & 37 Vict. c. 66, s. 31 (5).

<sup>5</sup> 38 & 39 Vict. c. 66.

<sup>2</sup> 23 & 24 Vict. c. 144, s. 1.

<sup>4</sup> 55 & 56 Vict. c. 19.

<sup>6</sup> 36 & 37 Vict. c. 66.

The Canon Law was re-enacted as Statute in respect of divorces *a mensa et thoro*, and incorporated in respect of suits for nullity, restitution of conjugal rights, and jactitation of marriage (s. 6). The word divorce was legally identified with dissolution, and ceased to bear its Canon Law meaning; for the Act provided (s. 7) that no decree should thereafter be made for divorce *a mensa et thoro*, but that in the relevant cases the Court would pronounce a decree of judicial separation, obtainable (s. 16) either by a husband or by a wife, on the ground of adultery, cruelty, or desertion without cause for two years and upwards, and as implied by s. 7, on any ground on which a decree *a mensa et thoro* could have been obtained before the Act of 1857.<sup>1</sup> Application for this on any of the specified grounds, or for restitution of conjugal rights, could be made by either husband or wife by petition to the Court, or to any Judge of Assize (s. 17).<sup>2</sup> Suits for nullity came under the jurisdiction of the new Court (s. 6), and in pursuance of the Canon Law could be brought on the grounds of age, affinity, bigamy, insanity at the time of the celebration of the marriage, marriage by force (which excludes consent), and legally defective celebration of the marriage, and impotence. On the grounds of impotence and insanity a marriage may be voidable. On the other grounds, if they be upheld, it is void *ab initio*. Under the Matrimonial Causes Act, 1857, s. 35, now under the Judicature (Consolidation) Act, 1925, s. 193, the ordinary provisions for custody of children apply to the children of a marriage decreed void; and under the Matrimonial Causes Act, 1873,<sup>3</sup> s. 1, the provisions of the Act of 1860,<sup>4</sup> s. 7, and 1866,<sup>5</sup> s. 3, in respect of decrees of dissolution *nisi* and absolute, were made to apply to decrees and suits for nullity of marriage. This was confirmed by the Judicature (Consolidation) Act, 1925, s. 183 (1) and (2).

A further invention of the Canon Lawyers, by which a disillusioned and unwilling partner could be compelled to return to conditions of cohabitation, instead of being allowed to enjoy the more humane course of dissolution, was the Restitution of Conjugal Rights. The Act of 1857, s. 17, provided that petitions

<sup>1</sup> The ground of non-compliance with decree for restitution of conjugal rights even within two years was added by the M.C. Act, 1884, s. 5.

<sup>2</sup> This jurisdiction was removed from Assizes by the M.C. Act, 1858, s. 19.

<sup>3</sup> 36 & 37 Vict. c. 31.      <sup>4</sup> 23 & 24 Vict. c. 144.      <sup>5</sup> 29 & 30 Vict. c. 32.

for Restitution of Conjugal Rights, as for Judicial Separations, could be made to the new Court or to a Judge of Assize, this alternative being afterwards repealed by the Act of 1858, s. 19. A decree of restitution to return (usually within fourteen days) must be followed by a certificate of compliance; and, in the event of failure to comply, the Court might order periodical payments by the respondent to the petitioner; Judicature (Consolidation) Act, 1925, s. 187 (1) and (2). The principal advantage of this legacy of the Canon Law lay in its adaptation by statute<sup>1</sup> to the needs of wives, whom the Act of 1857 had placed at a disadvantage.

Another petition inherited from the Canon Law may be brought to the Court on account of Jactitation of Marriage, and it seeks a decree requiring another party to refrain from stating that he or she is married to the petitioner. These suits for nullity of marriage, for restitution of conjugal rights, and on account of jactitation of marriage, were all taken direct from the previous ecclesiastical practice, and founded thereupon. Judicial separation, likewise an inheritance from the Canon Law, differed from the others only in this respect that it replaced the Canon Law divorce *a mensa et thora*, and was then founded, or refounded, on statute. Thus the substance of the Canon Law survived, and the principles and rules of the former Ecclesiastical Courts continued to govern the procedure of the new Court (s. 23). In respect of these causes the law has remained unamended in any serious particular. The Judicature (Consolidation) Act, 1925, repealed the sections which enacted or incorporated them, but, subject to the amendments which we have noted in the intervening Acts, the said Act re-enacted their substance in other words.

But if the scope of the Act of 1857 had been limited to this re-enactment or incorporation of the old Ecclesiastical Law in statutes to be administered by the new Crown Court, the reform would have done no more than to remove the vested interests of the Ecclesiastical Courts and to correct the abuses of the ecclesiastical administration. It would, indeed, have ensured the better administration of existing law, but would have given no new relief. But the Act went further and enacted new law in such wise that the ground hitherto recognized only in private Acts of Parliament, and therefore available only by rich and privileged people, now became cognizable by the Court, and could thus be used far more

<sup>1</sup> 47 & 48 Vict. c. 68. M.C. Act, 1884, s. 5, *infra*.

widely in relief of matrimonial distress. Yet, as we shall see, the legacy of the Canon Law was not limited to the suits which would have been heard in the old Ecclesiastical Courts and had now been transferred to the new Crown Court. While the Court was new, and the title of one of the decrees had been amended in such wise as to confine 'divorce' to that dissolution of marriage which provided the *pièce de résistance* of the Act, the new Statute Law retained wherever possible the old Canonical procedure.

### THE NEW GROUND

The new substantive law, which distinguished the English Law in Matrimonial Causes from the Canon Law which had reigned with virtually no relaxation for seven hundred years, was enacted in five sections of the Act of 1857—ss. 27, 28, 29, 30 and 31. To this new Statute Law, which provided for dissolution of marriage by divorce on the ground of proved adultery, and in s. 57, for the right of re-marriage, the rest of the Act is ancillary. We proceed to note the provisions of the Act, with the conditions of dissolution and the further amendments introduced by later legislation.

The new Act provided (s. 27) that any husband might present a petition to the new 'Court for Divorce and Matrimonial Causes' for the dissolution of his marriage, on the ground of the adultery of his wife during the period of their marriage (thus interpreting the famous clause in Matthew, 'except it be for fornication,' to mean post-marital adultery). And the same section proceeded to recognize with qualifications the just claims of women. For it provided that a wife might present a petition to the Court for the dissolution of her marriage on the ground that during the period of their marriage her husband had been guilty—not of adultery alone, as in her case, but—of incestuous adultery, or of bigamy with adultery, or of rape, or of sodomy or bestiality, or of adultery coupled with cruelty, or of adultery coupled with desertion without reasonable cause for at least two years. These grounds were seen to need some definition, and were further defined in the same section: Thus incestuous adultery for the purpose of the Act meant adultery with a woman whom the husband could not lawfully marry if his wife were dead, because she came within the prohibited degrees of consanguinity or affinity; bigamy meant

the marriage of any person while married—that is during the life-time of the husband or wife to whom the person is married—to another person, wherever the second marriage may have taken place (within or without the British Dominions); and cruelty was defined as such cruelty as without adultery would have entitled the wife to a divorce *a mensa et thoro*.

It will be seen that there was considerable inequality as between husbands and wives. For, while a husband could now petition for dissolution on the ground of his wife's adultery alone, i.e. without additional grounds, he could not petition for dissolution on any other grounds (saving, of course, a suit for nullity). But while a wife could not then petition for dissolution on the ground of simple adultery alone, but only on the more difficult and complicated grounds of incestuous adultery or adultery coupled with cruelty or desertion, she could petition for dissolution on the grounds of rape, sodomy, or bestiality.

The last-named grounds cannot be dismissed in a mere statement, for they were not parallel. Rape implies adultery, i.e. with a person other than the wife, and does not apply to forcible sexual intercourse of the husband with the wife, because cohabitation is a condition of the matrimonial contract. Such conduct on the part of a husband could be construed as cruelty only if it were successfully pleaded that it was injurious to the wife's health.<sup>1</sup> But then, if coupled with adultery, it would be a proper ground for a wife's petition for dissolution; or, alone, would be adequate ground for a petition for judicial separation under the Matrimonial Causes Act, 1857, s. 16.

But the unnatural offences of sodomy and bestiality furnish wider grounds. An attempt to commit either of these offences has been judged to be of itself sufficient ground for a judicial separation. But for a petition for dissolution the offence must be fully proved; and if only attempted, the offence, if so far proved, might sustain the charge of cruelty,<sup>2</sup> or even furnish ground for divorce for rape.<sup>3</sup> But as distinct from rape, sodomy has been held to be a ground for dissolution<sup>4</sup> whether committed with a wife or with another person. But the law made, and still makes,

<sup>1</sup> As in *Kelly v. Kelly* (1869), L.R. 2 P. & D. 59.

<sup>2</sup> *Thompson v. Thompson* (1901), 85 L.T. 172.

<sup>3</sup> *Coffey v. Coffey* [1898] P. 169; *Bosworthick v. Bosworthick* (1901), 50 W.R. 217.

<sup>4</sup> *C. v. C.* (1905), 22 T.L.R. 26 (offence with wife).

no direct provision for a corresponding petition by a husband for dissolution on the ground of his wife's unnatural offences. If the wife were the object of another man's attempt at rape, sodomy or bestiality, the man's offence would be a felony under the Criminal Law; but no action for dissolution would lie on the ground of adultery.<sup>1</sup> But if such attempt were alleged by the wife, and if her allegation of rape were not upheld, it would be open to the husband to petition for dissolution on the ground of adultery, provided that there was evidence of propinquity, or of gross indecent behaviour. Such a petition would probably be successful. But if the marriage had not been consummated and the wife could prove virginity, the Court might not feel justified in granting a decree. But although this was held in *Hunt v. Hunt*,<sup>2</sup> and intervention on the ground of virginity was successful in *Rutherford v. Rutherford (Richardson intervener)*,<sup>3</sup> it has to be admitted that proof of virginity is not always conclusive, because pregnancy is possible even in the case of a *virgo intacta*;<sup>4</sup> and quasi-sexual intercourse may constitute adultery, as held in *Elwes v. Elwes*,<sup>5</sup> and in *Jolly v. Jolly and Fryer* in 1919,<sup>6</sup> when the Judge, Hill, J., found adultery in spite of a medical certificate that the respondent was intact. But the law in Matrimonial Causes takes no account of a wife's unnatural offences with another woman. The Victorian legislators do not appear to have considered Sapphism or Lesbianism, and this no doubt reflects the current conception of women who were not then supposed to know or do these things. Yet such advantages as might then be thought to have been given to wives were felt not to balance the disability under which a wife was debarred from petitioning on the ground of adultery alone; and in spite of inherited prejudices, the tendency of both the Courts and the Legislature in the later 19th century, and to a greater extent in the 20th, was towards greater relief to wives.

#### RELIEF FOR WIVES

The right of a wife under this section (27) to petition for dissolution on the ground of her husband's adultery and cruelty, or

<sup>1</sup> *Clarkson v. Clarkson* (1930), 46 T.L.R. 623.

<sup>2</sup> (1856), Dea. & Sw. 121.

<sup>3</sup> [1922] P. 144, C.A.; [1923] A.C. 1 (H.L.).

<sup>4</sup> The statement attributed to the *obiter dictum* of a judge, that a *virgo intacta* is a *rara avis*, seems, in the light of scientific medical opinion on this point, to be a superfluous explanation!

<sup>5</sup> (1795), 1 Hag. Con. p. 276.

<sup>6</sup> 63 Sol. Jo. 777.

adultery and desertion, had become the subject of further legislation after two years from the passing of the Act of 1857. By the Matrimonial Causes Act, 1859,<sup>1</sup> it was enacted that on such a petition by a wife, the husband and wife respectively should be competent and compellable to give evidence of, or relating to, such cruelty or desertion. The obvious inequality, to which wives were subject under the same section, was further alleviated by adaptation of one of the causes inherited from the Canon Law—a circuitous, but at that stage a desirable device. The Matrimonial Causes Act, 1884,<sup>2</sup> provided that failure to comply with a decree for restitution of conjugal rights could be held to constitute desertion for the purpose of a petition for judicial separation; and for this purpose the statutory period of two years did not apply; and further, that such desertion through failure on the part of a husband to comply with a decree for restitution of conjugal rights, if he had also committed adultery, would entitle a wife to petition for dissolution on the grounds of adultery coupled with desertion. This enabled a wife to prove the requisite desertion in addition to adultery, as prescribed by the Matrimonial Causes Act, 1857, s. 27; and thus from 1884 to the Matrimonial Causes Act, 1923<sup>3</sup> (*infra*) a wife could obtain a divorce on this ground without having to bring against her husband the alternative and more ungracious allegation of cruelty.

But the inequality between husbands and wives was amended by no further legislation until the Matrimonial Causes Act, 1923,<sup>4</sup> by which (s. 1) it became lawful for a wife to petition the Court for the dissolution of her marriage on the single ground of her husband's adultery during the period of the marriage and after the passing of the Act, but without prejudice to her previous rights (i.e. her right to petition on the ground of incestuous adultery or bigamy with adultery, her right of coupling causes, and her right to petition for divorce under the Matrimonial Causes Act, 1857, s. 27, on the ground of her husband's rape, sodomy or bestiality, before the Act of 1923 was passed). This Act, of course, repealed all that part of the Act of 1857, s. 27, which prescribed as indispensable the peculiar conditions of dissolution of marriage on a wife's petition on the ground of adultery.

The result of this legislation was conveniently reproduced by

<sup>1</sup> 22 & 23 Vict. c. 61, s. 6.

<sup>3</sup> 13 & 14 Geo. V, c. 19.

<sup>2</sup> 47 & 48 Vict. c. 68, s. 5.

<sup>4</sup> 13 & 14 Geo. V, c. 19.



the Judicature (Consolidation) Act, 1925, s. 176.<sup>1</sup> Yet, at the end of it all, while the disabilities of a wife were removed, the counter-inequality remained that a husband could not petition for a dissolution on the ground of his wife's unnatural offences, unless they furnished evidence of adultery.

The disadvantages of wives have enjoyed a slow but sure elimination, even if the movement has in fact proceeded from the view of their inferior status. They are in a favourable position in the matter of costs, and their only legal disability to set against the less advantageous position of husbands on that count is the difficulty of claiming damages from a woman intervener (*vide* under Juries and Damages, *infra*).

#### RESPONDENTS AND CO-RESPONDENTS

The Act of 1857 proceeded (s. 28) to provide that husbands who were petitioners (under s. 27) should make the alleged adulterer a co-respondent to the petition, unless for special reasons the Court should excuse the petitioner from this course, and likewise, if the Court saw fit, the person with whom a husband was alleged to have committed adultery should be made a respondent. The same section provided that the parties jointly or singly could claim to have the contested matters of fact tried by a jury. Here are two quite distinct issues which invite separate treatment. The citing of male adulterers as co-respondents, and women with whom husbands were alleged to have committed adultery as respondents, suffered no amendment until the section was repealed by the Judicature (Consolidation) Act, 1925, s. 177 (1) and (2), and re-enacted in substance with the addition [in (1)] of a husband's cross-petition for divorce in answer to a wife's petition, when, as respondent, he must likewise make the alleged adulterer the co-respondent with his wife.<sup>2</sup> The question of Juries could

<sup>1</sup> This repealed (1) s. 27 of the Act of 1857, re-enacting only the words which remained relevant after the passing of the Act of 1923; (2) the Act of 1923, which was re-enacted as applicable to the adultery of a husband since July 17, 1923; (3) the Act of 1857, s. 6, the purport of which, making evidence of cruelty and desertion compulsory, was incorporated in the new composite section.

<sup>2</sup> N.B.—If the wife's petition were for judicial separation, and the husband petitions for divorce on the ground of his wife's adultery, cross-answer is not enough to secure divorce. It must be a cross-prayer to the petition if dissolution is desired.

more suitably be deferred for later consideration. It comes up again in one of the ancillary sections (33), and since in later legislation it has become more complicated, the two references had best be taken together in the light of the later law.

### BARS TO RELIEF

When (under s. 27) the petition has been presented, the Court is required (s. 29) to satisfy itself that the facts alleged are true or otherwise, and, if true, whether or no the petitioner has been accessory to or conniving at the adultery, or has condoned it. The Court must also enquire into any counter-charge against the petitioner.

In the event of the Court not being satisfied on the evidence that the alleged adultery had been committed, or finding that the petitioner had during the marriage been accessory to or conniving at the adultery of the other party, or had condoned the adultery complained of, or that the petition was presented or prosecuted in collusion with either of the respondents, then the Act provided (s. 30) that the Court should dismiss the petition. But if the Court were satisfied (s. 31) by proof of the alleged adultery and did not find any of these absolute bars, then the Court should pronounce a decree of dissolution. Yet the Act (same s. 31) made a further provision which might prevent a decree of dissolution, viz. that the Court should not be bound to pronounce such a decree if it found that during the marriage the petitioner had been guilty of adultery, or that the petitioner had been guilty of unreasonable delay between discovery of the alleged adultery and the filing of the petition, or of cruelty to the other party, or of wilful or unreasonable desertion before the adultery complained of, or of such wilful neglect or misconduct as had conduced to the adultery.

The vigilance thus required of the Court applied necessarily to undefended causes. The charges brought by a petitioner must be proved to the satisfaction of the Court, and in Matrimonial Causes there is no judgement by default.

These sections dealing with the duty of the Court in hearing evidence, both in proof of the alleged offence and in the matter of absolute and discretionary bars to a decree of dissolution, were repealed by the Judicature (Consolidation) Act, 1925, s. 178, and re-enacted in the same composite section.

## RE-MARRIAGE

Granted the requisite evidence in proof of the alleged offence, and in the absence of absolute and discretionary bars, the Court was then empowered and required to pronounce a decree of dissolution of the marriage. But the process was not then complete. For a dissolution alone would be of little advantage over the old Canon Law divorce *a mensa et thoro* now re-enacted by statute under the form of judicial separation. The case for complete divorce turned on the right of the persons whose marriage had been dissolved to marry other partners. Otherwise, there could be no justification for the new divorce procedure, and the new legislation would have failed in the very purpose for which it had been introduced. Therefore, the Act must needs make provision for re-marriage, and it was enacted accordingly (ss. 57 and 58) that after pronouncement of a decree of dissolution, and after the lapse of time enough to allow for appeal or after the dissolution had been upheld on appeal, the disunited parties were free to marry again. But the Act provided that the parties could claim the right to be married in Church by the Established Clergy, subject only to one conscience clause, viz. that no clergyman could be compelled to solemnize the marriage of any person who had been divorced on the ground of his or her adultery; but that if a clergyman could be found who was willing to solemnize such a marriage he should be permitted to do so and should suffer no censure for his act. That is to say, the 'innocent' party can claim as of right to be married in his or her parish Church by the usual clergy; and the 'guilty' party likewise can claim to be married in Church, but cannot insist on the services of the said clergy. If, however, another qualified clergyman is willing to perform such marriage, the Incumbent of the Parish Church is required to permit him to do so.

These two sections, again, were repealed by the Judicature (Consolidation) Act, 1925, s. 184 (1), (2) and (3), and re-enacted in substance but with necessary reference to certain intervening Acts. The right of re-marriage remains, together with permission for the use of the churches or chapels of the Church of England on the previous terms. But provision was made for the Court first to pronounce a decree absolute in addition to the time required for appeal in accordance with the Matrimonial Causes

Act, 1868<sup>1</sup> (s. 4), and with further reference to Matrimonial Causes Act, 1860 (s. 7), and Matrimonial Causes Act, 1866 (s. 3) (*supra*). In the meantime, moreover, the Deceased Wife's Sister's Marriage Act had been passed in 1907,<sup>2</sup> and the Deceased Brother's Widow's Marriage Act in 1921,<sup>3</sup> and the law was made to contain a proviso to the effect that while marriage with a *deceased* wife's sister and a *deceased* brother's widow had become lawful, marriage with a *divorced* wife's sister or a *divorced* brother's widow was disallowed. It was of no account which party might be the petitioner or which party the respondent: 'innocent' and 'guilty' are alike debarred within these relationships. Thus, owing to ecclesiastical opposition and influence the law in this particular was bent to serve the view that dissolution by divorce is not the equivalent of death. In all other respects it has the same liberating effect upon both parties, as the death of one has upon the survivor, saving, of course, the right of divorced persons to re-marry one another. In respect of marriages with a deceased wife's sister and a deceased brother's widow, while these might lawfully be celebrated in Church, it was enacted that the clergy should be subject to no censure either for performing such marriage services or for refusing to perform them.

We have now remarked the essential legislation by which the Act of 1857 effected the reform of the law in Matrimonial Causes, and have followed the course of the law, from petition to dissolution and re-marriage, from 1857 to its change or confirmation in 1925. There are yet to be noted some ancillary sections in the Act of 1857, and the innovations and amendments of succeeding Acts.

### JURIES AND DAMAGES

The employment of Juries for the trial of matters of contested fact (s. 28) has been deferred for fuller consideration in relation to the employment of Juries for other purposes. Under s. 33 it was provided that a petitioner might claim damages from a co-respondent, that such petition should be heard and tried according to the rules by which actions for criminal conversation were then tried in Courts of Common Law, and that the damages should be assessed by a Jury; further (s. 36), that the

<sup>1</sup> 31 & 32 Vict. c. 77.

<sup>2</sup> 7 Ed. VII, c. 47, *vide* ss. 3 (2), 5.

<sup>3</sup> 11 & 12 Geo. V, c. 24, *vide* s. 1 (2) (b), (4), re-enacted in Judicature (Consolidation) Act, 1925, s. 184 (1).

Court could direct the truth in questions of fact to be determined by a special or common jury, the jury (s. 37) being summoned according to the process employed in the Common Law Courts, the question to be tried (s. 38) being reduced into writing, and the Judge having powers as at *nisi prius*. Sections 37 and 38 were repealed by Administration of Justice Act, 1925,<sup>1</sup> s. 27 and fourth schedule, and the s. 36 by the same Act, s. 29 (4) and fifth schedule. The former sections (28 and 33) introduce an interesting history of enactment and repeal.

It will be remembered that the Act of 1857, s. 28, provided that either or both of the parties might claim to have the contested matters of fact tried by a jury 'as hereinafter mentioned,' i.e. in ss. 33, 36, 37 and 38. This right of trial by jury survived the Juries Act, 1918,<sup>2</sup> and the Administration of Justice Act, 1920,<sup>3</sup> s. 2. But this last section was repealed by the Administration of Justice Act, 1925,<sup>4</sup> which enacted (s. 3) that the appointment of Juries could be made by rules of Court as though the Juries Act and the Administration of Justice Act, 1920, s. 2, had not passed. This again was repealed by the Judicature (Consolidation) Act, 1925, which provided in s. 99 (1) (*h*) that rules of Court could be made under the Act prescribing for what cases Juries should be required. The same Act s. 103, provides for former procedure except as prescribed under the said Act; but s. 177, which repeals and re-enacts part of s. 38 of Matrimonial Causes Act, 1857, omits the final clause which provided for the right to a jury. So that the statutory right to trial by jury has been removed, and trial by jury is subject to Rules of Court. This applies even to the appointment of juries for assessment of damages. For, in accordance with the Juries Act, 1918 (*supra*), and the Administration of Justice Act, 1920 (*supra*), s. 2, the assessment of damages by a jury was provided for unless by an order on summons the assessment was directed to be made by the Judge hearing the case alone. The Administration of Justice Act, 1925 (*supra*), repealed s. 2 of the Act of 1920; so that s. 33 of the Act of 1857, which provided that the damages on a petition should in all cases be ascertained by the verdict of a jury, once more came into force for a short time and restored the unqualified assessment of damages by juries. But this section (33) of the Act of 1857 was repealed by

<sup>1</sup> 15 & 16 Geo. V, c. 28.

<sup>2</sup> 8 & 9 Geo. V, c. 23.

<sup>3</sup> 10 & 11 Geo. V, c. 81.

<sup>4</sup> 15 & 16 Geo. V, c. 28.

the Judicature (Consolidation) Act, 1925, s. 189, and re-enacted without explicit direction for the appointment of a jury, but only with a reference to the provision of any enactment relating to trial by jury in the Court. The position appears therefore to be determined by the Rules of the Supreme Court Order, 36, rules 2-6, wherein as a general practice the Judge shall sit without a jury; but under rule 6, i.e. in matters or causes other than the special conditions set out in rules 3, 4, 5, under which the Court or Judge has discretion, it is provided that an order shall be made for trial by jury if any party concerned applies for it on the conditions which the rule prescribes.

Thus, although a jury is not unusual in a matrimonial suit wherein damages are claimed, the right to a jury is now somewhat circumscribed; and thus the award and the allocation of damages claimed from a co-respondent may be determined by the Judge. It is to be noted that a claim for damages may be made on a petition for divorce or judicial separation, or it may be a claim for damages only. If on the evidence a petition for divorce or judicial separation could have been refused, damages will also be refused, as in *Cox v. Cox and Warde*,<sup>1</sup> where the petition was for damages only. If the husband and wife are already living apart, this is generally a bar to a claim for damages; but if the wife is dead, a claim for damages is not on that account refused.

There is a justification for damages in straightforward suits; but it is a reasonable contention that a husband should not make money out of his wife's adultery when it is due to conditions for which he is responsible. But a strange inequality subsists in the fact that whereas damages are recoverable by a husband from a co-respondent, no provision exists whereby a wife may claim damages from the woman with whom her husband committed adultery—unless an action could be found to lie at Common Law on the ground of enticement,<sup>2</sup> which is not easy to prove.

This is another example of the ingrained assumption of the inferior status of women which was inherited from the Canon Law; and the fact that an injured wife cannot claim damages from the offending woman is aggravated by the assumed dependence of a guilty wife, who, at the discretion of the Court, may benefit by the damages awarded to her husband.<sup>3</sup>

<sup>1</sup> [1901] P. 267.

<sup>2</sup> *Gray v. Gee* (1923), 39 T.L.R. 429.

<sup>3</sup> M.C. Act, 1857, s. 33; Judicature (Consolidation) Act, 1925, s. 189 (3).

## CUSTODY OF CHILDREN

When a marriage is dissolved and has not been childless, the custody and welfare of the children is a serious responsibility both to the parties concerned and to the Court. The Act of 1857, s. 35, provided that even while a suit was proceeding, whether for judicial separation, nullity of marriage or dissolution of marriage, the Court could make interim orders for the custody, maintenance and education of the children, and might direct proceedings for placing the children under the protection of the Court of Chancery. The Act of 1857, s. 4, provided that after a final decree in any of the above causes, if orders were not made for the custody of the children either in the final decree or while the decree was pending, the Court might on application by petition make such orders. The Act of 1878,<sup>1</sup> s. 4 (2), added that, at the discretion of the Court or magistrate, the custody of children under ten should be given to the wife. (Repealed by Summary Jurisdiction (Married Women) Act, 1895, s. 12.<sup>2</sup>)

The Matrimonial Causes Act, 1884,<sup>3</sup> s. 6, gave to the Court similar powers for the custody of children during proceedings for the restitution of conjugal rights. All this legislation was repealed and partly re-enacted by the Judicature (Consolidation) Act, 1925, s. 193 (1), which provided for the Court to make such provision as should seem just to put the children under the protection of the Court, and s. 193 (2) which brought proceedings for the restitution of conjugal rights into line with those hitherto applicable to judicial separations in respect of the custody of children.

## SETTLEMENT OF WIFE'S PROPERTY

The Act of 1857 provided further (s. 45) that in a case in which the Court pronounced a decree of divorce or judicial separation the Court could make a settlement of any property, to which the wife was entitled either in possession or reversion, for the benefit of the innocent party or of the children. To this provision the Act of 1860 (s. 6) added that any such act of the Court at the time of, or after, the pronouncing of a final decree of divorce or judicial separation, should be deemed valid and effectual 'notwithstanding

<sup>1</sup> 41 & 42 Vict. c. 19.

<sup>2</sup> 58 & 59 Vict. c. 39.

<sup>3</sup> 47 & 48 Vict. c. 68.

the existence of the disability of coverture at the time of the execution thereof.' The settlement implies the separation of the married person; coverture means that the wife is under the protection of her husband. The Matrimonial Causes Act of 1884 extended the power of the Court, in the matter of settlement for the benefit of the petitioner and the children, to applications for restitution of conjugal rights. These enactments were repealed by the Judicature (Consolidation) Act, 1925, s. 191, which re-enacted these powers of the Court for the settlement of the wife's property for the benefit of the petitioner and the children of the marriage.

#### VARIATION OF SETTLEMENTS

The Matrimonial Causes Act of 1859, s. 5, had extended these powers of the Court, after a final decree of dissolution or nullity, to cover ante- or post-nuptial settlements, and the Matrimonial Causes Act of 1878, s. 3, extended them further to cover the said ante- or post-nuptial settlements, 'notwithstanding that there are no children of the marriage.' This was repealed but re-enacted by the Judicature (Consolidation) Act, 1925, s. 192.

There might well appear to be in all this legislation an assumption and prejudice against wives. It is true that the attitude of the Court tended to advance ahead of the legislature in interpretation favourable to wives; but the guilt of wives as compared with that of husbands seems to have been a 'complex' in the mind of the period. The variation of settlements was indeed limited to ante- and post-nuptial settlements, i.e. to settlements made either between husbands and wives, or for their benefit as married people. It could not affect an independent instrument under which the parties to a marriage enjoyed a beneficial interest, nor could it affect the trusts of a wife even when the gift by will was to the trustees of a marriage settlement upon the trusts of the settlement. But although it applied only to settlements of property upon the parties to a marriage in their character as married people, and could not interfere with a trust deed under which a wife benefited independently of her position as a wife, yet the implication is that the relevant section of the Act of 1857 concerned the case of a guilty wife. In the opinion of Lord Penzance in *Worsley v. Worsley and Wignall*<sup>1</sup>: '... the Legislature

<sup>1</sup> (1869), L.R. 1 P. & D. 648, 651.



has armed the Court with authority to make special arrangements in the case of a woman being found guilty of adultery.' The modern critic is tempted to ask what special arrangements were made in the case of a *man* being found guilty of adultery.

To go further back to the Matrimonial Causes Act, 1857, s. 45, and the succeeding legislation: the power of the Court to order a settlement of a wife's property, either in possession or in reversion, for the benefit of the innocent party or/and of the children, turned on the commission of adultery by the wife. It may be argued that a guilty wife should pay; but the enquirer will search in vain for any section of any Act giving power to the Court for the specific settlement of the property of a guilty husband for the benefit of the innocent party and children. Such is the inherited prejudice, which is buttressed by the prescriptive title of the Canon Law to perpetuate the age-long ecclesiastical animosity against women.

It is true, of course, that the Matrimonial Causes Act of 1859, s. 5, followed by the Matrimonial Causes Act of 1878, s. 3, gave the Court a discretion to vary settlements without prejudice; and the Court has exercised this discretion in favour of wife petitioners not only when the property had been brought into the settlement by the wife or her family,<sup>1</sup> but even when the property came from the husband or his family.<sup>2</sup>

Since the re-enactment of these provisions in the Judicature (Consolidation) Act, 1925, several important decisions have been given. In *Prinsep v. Prinsep*,<sup>3</sup> it was decided by Hill, J., that a settlement, from whatever source, made upon a wife or husband, or both, in their character as married persons is a post-nuptial settlement within the meaning of the Act. Actually the settlement was made by the husband respondent's mother after the marriage for the benefit of the respondent, his wife and child—and of any future wife and children at the discretion of the trustees. The Judge then ordered a distribution of the property, by which a capital sum should be settled on the wife petitioner and the child of the marriage. Of the balance a large proportion was to be re-settled upon trust for the benefit of the respondent and any

<sup>1</sup> *Pollard v. Pollard*, [1894] P. 172.

<sup>2</sup> *Marsh v. Marsh* (1877), 47 L.J.P. 34; *Kaye v. Kaye* (1902), 86 L.T. 638.

<sup>3</sup> [1929] P. 225.

future wife and children, with an ultimate trust for the husband absolutely, and the final balance to be paid to the husband for his own use.

The Trustees appealed on the question of this apportionment, and although the petitioner and respondent agreed, the Court of Appeal upheld the Trustees and held that both the balance resettled and the sum to be paid to the husband for his own use should continue to be administered by the Trustees with such variation only as might be necessitated by the provision which had been made for the wife and child of the marriage which had been dissolved.<sup>1</sup> Here the guilty husband's estate was adequately applied to the support of the wife petitioner. In *Melville v. Melville and Wood*,<sup>2</sup> the settlement made by a guilty wife before the decree *nisi* was held by the Judge not to be a post-nuptial settlement within the meaning of the Act, because it was a settlement upon the wife for herself and for any of her future children with power to appoint to any future husband whom she might marry. Nevertheless, the Court of Appeal held that this was a post-nuptial settlement, for it was made on the parties whose marriage was the subject of the decree by one of the parties to the then existing marriage and in favour of the children of the marriage. Here, then, the guilty wife did not escape the claims of the husband petitioner.

The interpretation of this discretion under the Act (s. 192) is, then, that a settlement of property after the marriage on one or the other, or both, of the parties, is a post-nuptial settlement within the meaning of the Act, regardless of the source of the money settled. Thus it appears that the true interpretation of the provision for variation of settlements is that the Court shall ensure that the parties after divorce shall be placed as far as possible in the position in which they would have been if the marriage had not been dissolved through the guilt of one of them. While special consideration is due to the injured party and the children, if any, the variation ought not to be undertaken as in any sense a penalty to be imposed upon the guilty party.

This digression from past history to present practice may be justified in order to show the Court's care for precise justice, in contrast with the old inherited anti-feminine prejudice which we have noted. The inequality has been corrected in practice

<sup>1</sup> [1930] P. 49, *per* Lawrence L.J.

<sup>2</sup> [1930] P. 99, 159, C.A.

where the statute permits, and further it may be argued that it is met by the provisions for alimony.<sup>1</sup>

### ALIMONY AND MAINTENANCE

Alimony is nominally and almost invariably the maintenance of a wife by a husband, or out of the joint income, in consequence of a matrimonial cause; occasionally and exceptionally it may mean the maintenance of a husband. But since alimony is allowable to a wife both *pendente lite* on petitions for judicial separation, dissolution and nullity of marriage, and permanently after a decree of judicial separation (whether the wife be petitioner or respondent), it might be thought that the provision of alimony is, where it applies, an ample answer to the charge of inequality in matrimonial legislation. Especially would the argument be enforced in the case of judicial separation, where the separated parties are neither for practical purposes married, nor legally free to marry; and a husband may find himself required to go on making periodical payments even where his separated wife is living as the mistress of another man.

But provision for a wife after a decree of dissolution or of nullity is properly not alimony, but maintenance. Here the law provides that the Court may require the payment of a gross sum by the husband to be secured to the wife—which, once settled, could not be varied or discharged—or a periodical allowance; and although the condition of her remaining chaste (*dum casta*) ceased usually to be imposed, the maintenance was either conditional on her remaining unmarried (*dum sola*), or could be varied at the discretion of the Court.<sup>2</sup> It is, however, the case that a guilty wife is in practice debarred from applying for such maintenance, although the Court may require the allotment of a small allowance as a condition precedent to the granting of a decree absolute. This continues to be paid subject to the woman remaining unmarried and chaste. If a divorced wife married the co-respondent, or another, she would come under his protection and the maintenance would cease. Once more the prejudice against guilty wives,

<sup>1</sup> M.C. Act, 1857, ss. 17, 24, 32; M.C. Act, 1866, s. 1; M.C. Act, 1907, s. 1; Judicature (Consolidation) Act, 1925, s. 190.

<sup>2</sup> *Hulton v. Hulton* (1916), T.L.R. 137.

which applied their property to the benefit of the innocent party, deprived them of any substantial maintenance after decree.

Alimony could indeed bear hardly on husbands. Yet it furnished no adequate answer to the charge of bias in the law. For the fundamental defect was that the law continued to perpetuate the theory of women's inferiority. In further illustration of the tendency to overcome the inherited prejudice, and to qualify the inherited law, we may cite the Married Women's Property Acts of 1882<sup>1</sup> and 1893<sup>2</sup>, by which a married woman could hold and dispose of real or personal property as if she were a *feme-sole*. Under s. 17 of the Act of 1882, in the event of any dispute over the ownership of property in a matrimonial cause, enquiry can be made by the registrars under the direction of the Judge; and if a wife is proved to be in possession of property, she may be required to deposit it in Court under R.S.C. Order 50, r. 3. The equality of the sexes, alike in privilege and responsibility, is a process of protracted evolution; but it steadily gathers speed, and there are signs of its passing the equality point in the matter of privilege. For, under the Judicature (Consolidation) Act, 1925, s. 190, the Court is empowered to order permanent maintenance for a wife, after decree of divorce or nullity, to be paid by the husband. Thus, in the absence of a *dum sola* clause, the husband may find himself permanently supporting a former wife even after her re-marriage to another husband.

### COSTS

A large part of the law must necessarily be concerned with money. Damages, alimony and maintenance directly concern the litigant parties in their antagonistic relations. But further than that, the costs of the suit are payable by one party or the other, or both, at the discretion of the Court. The Matrimonial Causes Act of 1857 provided in s. 51 that the Court on the hearing of any suit might make any order which seemed just; and in a previous section (34) it had given power to the Court to order the adulterous party to pay the whole or part of the costs. The Judicature (Consolidation) Act, 1925, enacted in s. 50 that the costs should be at the discretion of the Court or Judge, subject to the provisions of the Act and Rules of Court and any other Act. The distribution

<sup>1</sup> 45 & 46 Vict. c. 75.

<sup>2</sup> 56 & 57 Vict. c. 63.

of costs, important to the pockets of litigants, does not necessarily arise in our consideration of reform of the Law in Matrimonial Causes except in so far as provision may be made for non-contentious suits, where, as proposed in a later chapter, the payment of costs would be by agreement between the mutually consenting parties, and not by order of the Court until the Court had the terms of the parties' agreement. Under the Act of 1857, the Court followed the assumption of feminine dependence and was favourable to wives. Whether the wife sued the husband or the husband sued the wife, the costs were payable by the husband, and in the event of a wife's petition, or if the wife were respondent, the Court could order the husband to secure the wife's costs. It was held, rightly, of course, in days when a wife's property became her husband's on her marriage, to be unfair that a wife should be prevented from bringing a suit, or defending it, for lack of funds. Her solicitor, moreover, was entitled to be secured of his costs. The principle was stated by Lord Justice Cotton in *Robertson v. Robertson*<sup>1</sup> in 1881 in terms which at that time none could controvert. But the reason why it was requisite that husbands should pay—viz. that all the property of wives was thus vested in them—is a reflection not on divorce practice but on the attitude of the age to which the divorce practice must needs conform itself. The next year the first of the Married Women's Property Acts enabled women to retain their own estates, and the independence of wives has further advanced. The change is exemplified in the modification of Cotton, L.J.'s principle by Lord Merrivale, in the case of *Pickett v. Pickett*,<sup>2</sup> in 1928, who disallowed the wife petitioner's costs, excepting a sum to be paid by the husband to defray the cost of meeting charges in the husband's answer. The Statute leaves the Court a large discretion, and the Judges are alive to the new conditions. Here, then, when the Statutes have not shown a presupposition about the feminine status, the law is seen in process of self-reformation.

#### APPEALS

The Act of 1857 provided that a decree of dissolution should take effect after such time as was needed for the presentation of

<sup>1</sup> 6 P.D. 119, C.A., at pp. 125-126.

<sup>2</sup> 73 Sol. Jo. 144.

an appeal, or after such appeal had been dismissed, or after dissolution had been pronounced as the result of appeal (ss. 56 and 57). The Matrimonial Causes Act of 1868 reduced the period for appeal to one month, in partial repeal of the Act of 1857, s. 56. In the meantime the Act of 1858, s. 17, showed that the provision for appeal applied to pronouncements of nullity; and by the Matrimonial Causes Act of 1860, by which the Judge Ordinary (s. 1) was empowered to hear and determine all matters hitherto requiring the full Court, an *interim* appeal (s. 2) lay from the Court of first instance to the full Court, and (s. 3) an appeal lay either from the full Court, or from the decision of the Judge Ordinary alone, direct to the House of Lords. The above s. 3 and s. 56 of 1857, and s. 17 of 1858, were repealed by the Act of 1868 (s. 2). By the Judicature (Consolidation) Act, 1925, s. 27, appeal lies from the High Court to the Court of Appeal; and further appeal lies only in cases of dissolution, nullity of marriage, declaration of legitimacy, or validity of a marriage, or on a question of law on which the Court of Appeal gives leave to appeal.

### DECREES

As early as 1860, when the matter of appeal was under revision, the procedure preliminary to the Court's final decree was extended by a new process. The Matrimonial Causes Act of 1860, s. 7, enacted that every decree for divorce should be in the first instance a decree *nisi*, which should not be made absolute until the passage of such time, not less than three months, as the Court should from time to time determine. During this period it would be competent for any person to show cause why the decree *nisi* should not be made absolute by reason of collusion or of material facts not brought before the Court. After this the Court would pronounce or withhold the decree absolute according to the requirements of justice. By the Matrimonial Causes Act of 1866, s. 3, the period was extended by statute to six months; and by the Matrimonial Causes Act of 1873, s. 1, both s. 7 of 1860 and s. 3 of 1866 were extended to decrees and suits for nullity of marriage. The resultant legislation is reproduced in the Judicature (Consolidation) Act, 1925, s. 183.

## THE QUEEN'S (NOW KING'S) PROCTOR

In order that, even in undefended causes, no decree should be given to those who were not legally entitled to it, the Act of 1857 followed the precedent of the ecclesiastical practice and required the Court to assure itself not only that the alleged offence was proved, but also that the petitioner's decree was not upset by any of the absolute or discretionary bars. For further assurance to this end the Legislature not only enacted the provision for the decree *nisi* to be followed by the decree absolute in conditions which justified it, but also by the Act of 1860 (*supra*), s. 5, invested the Queen's (now King's) Proctor (the official who formerly instructed the Advocates in Doctors' Commons) with the duties of investigation of all papers relevant to a suit, and, under the direction of the Attorney-General, of instruction to counsel to argue any point in court. This applied especially to undefended suits. But by s. 7 the Queen's Proctor's duties were extended to receiving and giving to the Court such information as might be material to the case either during the suit, when his action is known as intervention or before the decree *nisi* is made absolute, when he is described as showing cause. Evidence of collusion, or of any matter material to the true decision of the case, might be brought to the notice of the Court by the Queen's Proctor under the instruction of the Attorney-General and by leave of the Court. So seriously did the Legislature regard the practice of collusion, that for its due detection and the prevention of a miscarriage of justice provision was made to retain counsel and to subpoena witnesses and pay their costs, and likewise to pay the costs of the Queen's Proctor, out of the costs of the suit. The provisions of this Act were made applicable to suits for nullity of marriage by the Matrimonial Causes Act, 1873, s. 1. Further provision for the payment of the Queen's Proctor was made by the Matrimonial Causes Act, 1878, s. 2; and this legislation was repealed and re-enacted by the Judicature (Consolidation) Act, 1925, ss. 181, 182 and 183.

## SEPARATIONS UNDER SUMMARY JURISDICTION

We have noted that under the Canon Law women were at a great disadvantage in Matrimonial Causes, and that under the new

legislation they continued in great measure so to be. But even under the Act of 1857 husbands and wives were on the same footing in respect of grounds for a Judicial Separation, as indeed they had been in theory for the purposes of the Canon Law divorce *a mensa et thoro*, which the Act made statutory under the new name. In the matter of relief in smaller measure than dissolution, the Legislature has been generous to women beyond common justice to men.

In 1878 the Matrimonial Causes Act<sup>1</sup> provided that if a husband were convicted of an aggravated assault upon his wife within the meaning of the Offences Against The Person Act, 1861,<sup>2</sup> (s. 43), the Court or magistrate, before whom he had been thus convicted, could, in order to ensure the safety of the wife, give an order that the wife should be no longer bound to cohabit with her husband. This order had the effect of a judicial separation on the ground of cruelty. The Act provided for the financial support of the wife by the husband, and at the discretion of the Court gave to the wife the legal custody of children of the marriage under ten years old. But proved adultery by the wife disqualified her for this payment of money by the husband unless such adultery had been condoned.

After eleven years this Act was repealed by the Summary Jurisdiction (Married Women) Act, 1895,<sup>3</sup> which made larger provision for the separation and maintenance of wives. This Act defined assault more widely, and added desertion, persistent cruelty, and wilful neglect of the wife or the children, if such neglect or cruelty had caused her to leave and to live separately and apart from him. The wife's application could be made to any Court of Summary Jurisdiction appropriately located, or to the Court wherein the husband had been convicted, which would *ipso facto* become a Court of Summary Jurisdiction for this purpose. This Court had the power to give orders for non-cohabitation, legal custody of children to the wife, and payment of a maximum of £2 a week by the husband for the wife's maintenance. The wife's application was barred by proof of her adultery, unless it had been connived at or condoned by the husband. If the Court of Summary Jurisdiction thought fit to make no order, the case would be brought before the High Court; but the High Court could always refer the application back to the Court of Summary Jurisdiction with a

<sup>1</sup> 41 & 42 Vict. c. 19.

<sup>2</sup> 24 & 25 Vict. c. 100.

<sup>3</sup> 58 & 59 Vict. c. 39.



direction to hear again and determine the application. Appeal lay from the Court of Summary Jurisdiction to the Probate, Divorce and Admiralty Division of the High Court. To these reliefs the Licensing Act, 1902,<sup>1</sup> added the ground of habitual drunkenness, as defined by the Habitual Drunkards Act, 1879;<sup>2</sup> but in common fairness extended this ground to husbands whose wives were habitual drunkards, as above defined, and made the same provisions, except that legal custody of children was left to the discretion of the Court. The payments to be made by a husband were further amended by the Married Women (Maintenance) Act, 1920,<sup>3</sup> whereby an order, which gives the legal custody of children to the applicant wife, should include a provision that the husband shall pay a maximum of 10s. a week for each child under sixteen.

Finally, the Summary Jurisdiction (Separation and Maintenance) Act, 1925,<sup>4</sup> removed the condition that, where relief was sought on the ground of cruelty or neglect, these offences should have caused a wife to leave her husband and live separately; and added, as further grounds for a wife's application, her husband's persistent cruelty to her children, her husband's insistence on sexual intercourse with her while he was suffering from venereal disease and knowing that he was so suffering, and such conduct of her husband as caused her to submit herself to prostitution. At the same time the Act extended the grounds on which a married man could obtain summary relief, to include his wife's persistent cruelty to the children; and removed the effect of any order made for the wife's relief if the wife continued to reside with her husband, or if the wife should resume cohabitation. To the effect of connivance or condonation in excusing a wife's adultery, the Act added the husband's conduct conducing through failure to make the payments ordered by the Court. If, however, on account of the wife's adultery the Court should discharge the order, the provision of non-cohabitation would cease, but the Court would make a new order giving custody of children to the wife, and providing for the husband to pay a maximum of 10s. a week for each child under sixteen. The Act further extended the definition of habitual drunkenness to the taking of drugs, otherwise than under medical instruction; and included some technical amendments which

<sup>1</sup> 2 Ed. VII, c. 28, s. 5.

<sup>3</sup> 10 & 11 Geo. V, c. 63.

<sup>2</sup> 42 & 43 Vict. c. 19.

<sup>4</sup> 15 & 16 Geo. V, c. 51.

involved no serious points of principle for our present purpose. One practical effect of the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1925, has been to enlarge the area of operation of judicial separations.

### POOR PERSONS' CAUSES

The Act of 1857, which established the Court for Divorce and Matrimonial Causes, provided in s. 17 that petitions for Judicial Separation and Restitution of Conjugal Rights could be brought before a Judge of Assize. This was repealed in 1858; but the history of Summary Jurisdiction shows how far the Legislature has allowed Matrimonial Causes to be heard by Courts outside the Divorce Division, saving always the right of appeal.

The wisdom of the policy of permitting untrained Justices of the Peace, who are commonly concerned only with petty offences, to make orders in cases so intimately wrapped up with the destinies of family life is seriously to be questioned, for reasons which will be realized in our treatment of Separations. But this particular criticism does not apply to other extensions, although some doubt has been thrown upon the expediency of allowing Matrimonial Causes to be brought to Assizes. The Assizes rank as the High Court, and the question of legal competence does not arise as it does in the matter of Matrimonial Causes before the local justices. Moreover, the innovation of investing a Commissioner of Assize with power to hear Matrimonial Causes dates from the Lord Chancellorship of Lord Birkenhead, whose personal interest in the cause of Divorce Law Reform, apart from his great distinction as a lawyer, disarms the criticism made by those who have at heart the cause of justice.

The cases which may be brought at Assizes are strictly limited to (1) undefended causes (where the contentious matter will be confined to proof of the alleged offence, and to the allegation of absolute and discretionary bars by the King's Proctor or another), and (2) Poor Persons' Causes under Order XVI of Rules of the Supreme Court, Part IV (of which the venue is thus provided in order to save the expense of trial in London). The criticism of this extension of the hearing of Matrimonial Causes to Assizes, so far as it rests on responsible legal grounds, was advanced

in the case of *Apted v. Apted and Bliss*,<sup>1</sup> by the Attorney-General, who suggested that the great increase in the number of decrees in undefended suits was due in part to their trial by King's Bench Judges, who had not enjoyed the experience of long years in the Divorce Division. But this extension seems in this way to have contributed to the wider conception of Discretion, which in recent years has come into vogue to the relief of many petitioners.

*Note on the New Legislation since the Judicature  
(Consolidation) Act, 1925*

The following new Acts which appear on the preliminary list of Statutes will for the most part receive reference in the later chapters of this book. The Summary Jurisdiction (Separation and Maintenance) Act, 1925, which followed the Judicature Act of the same year, has been mentioned. The Indian and Colonial Divorce Jurisdiction Act, 1926,<sup>2</sup> has facilitated relief for European residents in India whose domicile is in England or Scotland. The Legitimacy Act, 1926,<sup>3</sup> legitimates a child born before the marriage of the parents, if he or she is the child of both of the parties who marry and not the child of one of them through adultery with a third party during a previous marriage. The Judicial Proceedings (Regulation of Reports) Act, 1926,<sup>4</sup> limits the liberties of press reports of Matrimonial Causes to the recitation of legal argument and fact. The Age of Marriage Act, 1929,<sup>5</sup> raised the lawful age for the marriage of either sex to sixteen. The Marriage Measure, 1930,<sup>6</sup> promoted by the National Assembly of the Church of England, permits the publication of banns, without qualification by residence, in the Parish Church of the ecclesiastical area wherein the person is accustomed to worship, provided that the banns are published also in the Parish Churches of the places of residence of both parties. The test of customary worship is the subscription of the person on the Electoral Roll of the Parish Church. The Marriage (Prohibited Degrees of Relationship) Act, 1931,<sup>7</sup> permits marriage

<sup>1</sup> [1930] P. 246; 46 T.L.R. 456, at p. 458.

<sup>2</sup> 16 & 17 Geo. V, c. 60.

<sup>3</sup> 19 & 20 Geo. V, c. 36.

<sup>4</sup> 21 & 22 Geo. V, c. 31.

<sup>5</sup> 16 & 17 Geo. V, c. 40.

<sup>6</sup> 16 & 17 Geo. V, c. 61.

<sup>7</sup> 20 Geo. V, No. 3.

with a nephew or niece by marriage, with the same conditions governing marriage in Church as in the case of the Deceased Wife's Sister and the Deceased Brother's Widow Acts, 1907 and 1921 respectively. The three Acts are to be cited as the Marriage (Prohibited Degrees of Relationship) Acts, 1907-1931, the Act of 1907 being known as 'the principal Act.'



*BOOK II*

RELIEF UNDER THE PRESENT LAW



## SECTION I

### POSSIBILITIES OF RELIEF

The last chapter of Book I brought our enquiry into the English Law in Matrimonial Causes virtually up to date, but has left the controversial issues, which are inseparable from any consideration of reform of this branch of the law, to be treated with fuller reference in separate chapters. We proceed therefore to set out the possibilities of relief under the present law, together with the bars which operate either absolutely or at the discretion of the Court to prevent such relief as the law otherwise allows. The relevant sections of the Judicature (Consolidation) Act are printed in Appendix I; and it now requires only a brief statement of the present possibilities of relief in three sections. In the circumstances of the Act of 1857, the grounds of relief were taken in an order determined by the inherited law. The Ecclesiastical Courts had provided for divorce only in the variety known as divorce *a mensa et thoro*; but although they did not allow divorce *a vinculo matrimonii*, history shows that the word had a loose application to annulments of marriage which could, as we have seen, frequently be obtained under the Canon Law. Under the new Act divorce *a vinculo matrimonii* was a statutory novelty, and followed the re-enactment of existing causes. But the old form of separation *a mensa et thoro*, replaced by the Judicial Separation, has only an academic historical priority, and in the Judicature (Consolidation) Act, 1925, rightly follows after the sections which enact the grounds, and regulate the procedure, in respect of Divorce and Nullity of Marriage. It will be convenient to treat the varieties of relief in the order of those which (1) annul a marriage, (2) dissolve a marriage, (3) effect a separation without the right of re-marriage.

#### (i) ANNULMENT

This process was the subject of enquiry in its historical place in our study of the Canon Law, and received further illustration in the historical examples of the annulments of Henry VIII. Under



the Act of 1857 the new Court inherited the jurisdiction of the Ecclesiastical Courts in suits for nullity. Marriages are null and void (1) if the parties at the time of marriage have not reached the requisite age, i.e. under the Age of Marriage Act, 1929,<sup>1</sup> they must not be under sixteen years of age; (2) if either of the parties is already married (bigamy); (3) if the parties are related within the prohibited degrees of consanguinity and affinity;<sup>2</sup> (4) if at the time of the marriage either of the parties is (a) a certified lunatic, (b) insane but not certified; (5) if either of the parties is coerced into marrying, or is mistaken in the understanding of the true nature of the marriage contract, or otherwise marries without giving free consent (N.B.—concealment of facts by one party, e.g. the woman's pregnancy by another, does not invalidate marriage); (6) if there is a legal defect in the celebration of the marriage; (7) if either of the parties is incapable of performing marital duties (impotence). On all these grounds, except (4) (b) and (7), a marriage is void and may not necessarily require a decree to declare it so. In the case of insanity, whereas the marriage of a certified lunatic (even during a lucid interval) is void (Marriage of Lunatics Act, 1811 (51 Geo. III, c. 37), other marriages of insane persons not 'so found' require a decree to void them. A suit for nullity on the ground of impotence requires a decree of the Court. Without a decree the marriage is not void, but voidable; but a decree renders such a marriage void *ab initio*. The effect of a decree of nullity is that the marriage has in fact never existed. It is clear that even in the absence of a decree of nullity some marriages are *ipso facto* null and void; as, for example, a successful prosecution on the charge of bigamy not merely renders the bigamous marriage void, but shows without a decree of nullity that such marriage was void *ab initio*. But *per contra* a marriage in which one party is physically impotent remains a marriage in the absence of a successful suit, although a decree of nullity renders it void *ab initio*.

<sup>1</sup> 19 & 20 Geo. V, c. 36.

<sup>2</sup> These, which are to be found in the Book of Common Prayer, have been relaxed by (1) the Deceased Wife's Sister Act (1907) (7 Ed. VII, c. 47); (2) The Deceased Brother's Widow Act, 1921 (11 & 12 Geo. V, c. 24); and (3) the Marriage (Prohibited Degrees of Relationship) Act, 1931 (21 & 22 Geo. V, c. 31).

## (ii) DISSOLUTION

A petition for divorce (as now understood to mean divorce *a vinculo matrimonii*, or dissolution of marriage) may be brought in the High Court by either a husband or a wife on the ground of the adultery of the other party during the marriage. When the wife is the petitioner it must be shown that the adultery occurred on or since July 18, 1923, the date of the Matrimonial Causes Act of that year.<sup>1</sup> Simple adultery on the part of a husband was not sufficient ground for a wife's petition before that date; but incestuous adultery or adultery with bigamy was, and is, a valid ground for a wife's petition. Otherwise, if the alleged adultery were before July 18, 1923, and was not incestuous or bigamous, it must be coupled with cruelty, or with desertion for two years or more, or with non-compliance with a decree for restitution of conjugal rights (which last under the Matrimonial Causes Act of 1884 became the equivalent of such desertion). Since the Act of 1923, the additional clauses ceased to be indispensable to a wife's petition, but were still available. Thus a wife may now present a petition for dissolution on any one of the following grounds: (1) adultery, (2) adultery with cruelty, (3) adultery with desertion, (4) incestuous adultery, (5) bigamy with adultery, both with the same woman, (6) rape, (7) sodomy, (8) bestiality. But a husband cannot claim relief on the ground of his wife's unnatural offences. In the case of a petition by a husband, all the alleged adulterers must be made co-respondents, unless the Court otherwise directs, and damages may be claimed from any of them. A decree of dissolution on the ground of the wife's adultery with one of the co-respondents does not prevent a husband from proceeding for damages against another. Thus a dissolution of marriage cannot be obtained on any other ground than adultery, or at least some equivalent sexual offence. Neither cruelty, nor desertion, nor incurable lunacy, nor incorrigible drunkenness, nor imprisonment for life, nor fundamental incompatibility, nor a mutual desire to put an end to a marriage which has proved to be disastrous, is of any avail to secure a divorce in the absence of the requisite proof of the adultery of one of the parties.

<sup>1</sup> Judicature (Consolidation) Act, 1925 (15 & 16 Geo. V, c. 49), s. 176; M.C. Act, 1923 (13 & 14 Geo. V, c. 19), s. 1.

## (iii) SEPARATION

Under the same Act<sup>1</sup> a husband or wife may petition for a decree of judicial separation, under which the parties remain legally married, but separated in such wise as to provide a good answer to a petition for restitution of conjugal rights. It does not preclude a cross-petition for dissolution, nor is it a bar to further proceedings for dissolution by the same petitioner. It may be sought by a husband or wife on the ground of adultery, cruelty, desertion without cause for at least two years, failure to comply with a decree for restitution of conjugal rights, or on any other ground on which a decree of 'divorce' *a mensa et thoro* could have been pronounced by the Ecclesiastical Courts before the Matrimonial Causes Act of 1857.

It may be sought by a wife on the grounds of the unnatural offences of sodomy and bestiality, as in the case of a petition for dissolution; but whereas the mere attempt of a husband to commit these offences is not sufficient ground for a dissolution, it is sufficient for a judicial separation.<sup>2</sup> It appears from the more recent case of *Foster v. Foster*<sup>3</sup> that a successful attempt at sexual intercourse with a wife against her will, although not otherwise cognizable by the Court, constitutes cruelty if to the knowledge of both parties the husband is suffering from venereal disease;<sup>4</sup> and in these conditions it is not necessary that the wife should be infected.

As in the case of petitions for dissolution, a husband, but not a wife, may claim damages, and the alleged adulterer will then appear as a co-respondent. This surviving statutory disadvantage to wives is more than balanced by the supposed advantage which the judicial separation has given to women. For although otherwise this decree of separation is obtainable on equal terms by husbands and wives, women have sought it to a much greater extent than men. While a judicial separation removes the respondent spouse from cohabitation, it prevents him from contracting another marriage, and thus serves the feminine possessive sense.

To this relief by judicial separation must be added the provi-

<sup>1</sup> Judicature (Consolidation) Act, 1925, s. 185.

<sup>2</sup> *Bromley v. Bromley* (1793), 2 Add., 158 n.

<sup>3</sup> [1921] P. 438.

<sup>4</sup> It has more recently been shown in some unreported cases that even in the absence of venereal disease undue force has been held to furnish ground of cruelty.

sions for Separation and Maintenance Orders under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895-1925, and deeds of separation, or agreement to live separately, which may act as a bar to a suit either on the ground of desertion or for restitution of conjugal rights. The grounds of relief by Separation Orders have grown into a long list, which it may be well to summarize at this point. On the application of a wife relief may be given by a Court of Summary Jurisdiction where—

(1) her husband has been convicted summarily of an aggravated assault upon her within the meaning of the Offences Against The Person Act, 1861, s. 43;

(2) her husband has been convicted on indictment of an assault upon her, and sentenced to pay a fine of more than £5, or to a term of imprisonment exceeding two months;

(3) her husband has deserted her;

(4) her husband has been guilty of persistent cruelty to her or her children; or of wilful neglect to provide maintenance for her or her children whom he is legally required to maintain;

(5) her husband, while suffering from a venereal disease, of which he is aware, has insisted on having sexual intercourse with her;

(6) her husband has caused her to submit herself to prostitution;

(7) her husband is an habitual drunkard as defined by the Habitual Drunkards Act, 1879, s. 3, as amended by the Summary Jurisdiction (Separation and Maintenance) Act, 1925, i.e. that he has by habitual drinking or drug-taking (other than under medical instructions) rendered himself dangerous or incapable.

And on the application of a husband relief likewise will be given on the grounds that—

(1) his wife is an habitual drunkard (as above);

(2) his wife has been guilty of persistent cruelty to the children of the marriage.

On all of these grounds an order may be given, (1) exempting the applicant from cohabitation, a provision which has the force of a judicial separation on the ground of cruelty; (2) providing for the legal custody of the children; and (3) ordering the payment by the husband of a weekly sum of not more than £2 for his

wife's maintenance and not more than 10s. a week for each child under sixteen years of age.

The consequence of the Summary Jurisdiction (Separation and Maintenance) Acts, 1895-1925, has been in effect a considerable extension of the practice of judicial separation. Separation Orders containing a non-cohabitation clause may now be given by a Court of Summary Jurisdiction to a wife on seven grounds and to a husband on two grounds. Under the Act of 1895, s. 5 (a), it is provided that the non-cohabitation clause 'while in force shall have the effect in all respects of a decree of judicial separation on the ground of cruelty.' That is to say, that the parties are separated although they remain married, and the wife becomes a *feme-sole* in respect of her property and also for contracts and litigation.<sup>1</sup> In *Harriman v. Harriman*,<sup>2</sup> however, it was held that the advantage thus attaching to the non-cohabitation clause may apply only when inserted on the ground of cruelty. When inserted on the ground of desertion, it may not carry this advantage to a wife, and is otherwise (as we shall note later) an inappropriate remedy because it terminates the desertion.<sup>3</sup> In view, however, of the much more numerous grounds on which a wife can obtain a Separation Order, this legislation has conveyed ostensible benefits to women. It is to be noted that while an order containing a non-cohabitation clause is not an absolute bar to a suit for dissolution by the husband on the ground of his wife's adultery,<sup>4</sup> it might operate at the Court's discretion.<sup>5</sup> And that is at once to show that every such order carries the risk to the husband, against whom it is made, that he may be separated permanently from his wife, yet permanently prevented from marrying in happier conditions.

The opportunities given to a husband of obtaining a Separation Order against a wife are confined, as we have seen, to two grounds. Here the wife has the advantage that even if the Separation Order is given to her husband, the Court may give an order for her maintenance at her husband's cost. But if she wishes to petition

<sup>1</sup> M.C. Act, 1857, ss. 25 & 26; M.C. Act, 1858, ss. 7 & 8; Judicature (Consolidation) Act, 1925, s. 194.

<sup>2</sup> [1909] P. 123, C.A. at p. 143 (per Fletcher Moulton, L.J.).

<sup>3</sup> *Dodd v. Dodd*, [1906] P. 189, approved in *Harriman v. Harriman* (*supra*).

<sup>4</sup> *Yeatman v. Yeatman & Rummell* (1870), 21 L.T. 733.

<sup>5</sup> On the ground of petitioner's cruelty, under Judicature (Consolidation) Act, 1925, s. 178 (3).

for dissolution on the ground of her husband's adultery, she then runs the same risk as the husband (in the last paragraph *supra*) of finding the relief barred at the discretion of the Court. Thus again a wife, against whom a Separation Order is made, may find herself separated permanently from her husband, yet permanently prevented from marrying another man.

The advantage suggested by the assimilation of the effect of a non-cohabitation clause to that of a judicial separation does not necessarily mean that a judicial separation is in fact a more desirable remedy than a Separation Order. On the contrary, while an order may serve the useful temporary purpose of protection, custody of children and maintenance—or of custody of children and maintenance only, when the non-cohabitation clause is not included in the order—the legal effect of a judicial separation is precisely that the separation is permanent, if the petitioner so desires, without registering in appropriate legal fact the moral dissolution which the breakdown of the marriage implies.

## SECTION II

### THE BARS TO RELIEF

#### CHAPTER I

#### INITIAL BARS

We are chiefly concerned here with petitions for dissolution, and in a secondary degree with those for judicial separation. Given adequate ground and requisite proof of the truth of the allegation made on that ground, the Court will pronounce a decree of dissolution or of judicial separation. But the case for either decree may be upset by the allegation of any of the Absolute or Discretionary Bars. These Bars, notably Connivance, Collusion and Condonation, of the one kind, and petitioner's adultery, unreasonable delay in presenting the petition, cruelty, desertion and conduct conducing, of the second kind, require some investigation owing to the large part which they play in suits for dissolution. But before treating of those which fill so conspicuous a page in the Law Reports, we must take account of certain conditions requisite for the hearing of a suit at all, the lack of which constitutes an absolute bar. It is then obvious that the Court cannot grant a decree on a petition which is not within its jurisdiction, or is unsupported by sufficient evidence. Nor does it follow that because a suit is undefended a decree will be granted; but if a suit cannot be defended because the respondent is insane at the time of the proceedings, this is not necessarily a bar to a decree, although it remains undecided whether or not insanity at the time when the offence was committed is a good defence.<sup>1</sup> A decree absolute is a bar to all further proceedings on the issue thus determined, and an unsuccessful action cannot be repeated between the same parties. But while the Common Law doctrine of estoppel bars an unsuccessful petitioner from presenting another petition on the same grounds,<sup>2</sup> no estoppel between the

<sup>1</sup> *Hanbury v. Hanbury*, [1892] P. 222.

<sup>2</sup> *Finney v. Finney* (1868), L.R. 1 P. & D. 483; cf. *Robinson v. Robinson* (1877), 2 P.D. 75, where such estoppel must be pleaded; *vide also Conradi v. Conradi, Worrall and Way* (*The Queen's Proctor intervening*) (1868), L.R. 1 P. & D.,

parties can bind the Court, or ensure that a decree will be given, e.g. if one party is estopped from denying facts of which the Court needs to be satisfied, and the party so appears to consent.<sup>1</sup> At the same time the Court will respect a covenant not to take proceedings on the ground of past offences, even if it fall short of the complete conditions of condonation.<sup>2</sup> But in so far as such covenant implies permission to commit further offences, it becomes void. It will, however, be read with a charitable construction; but the person so covenanting will be required to disprove any presumption of connivance. The incidence of the bars to relief upon the three forms of relief which were set out in Section I varies in intensity and effect; and, had it not been for recent developments, little need have been said about suits for nullity. It requires, however, that we take some account of what has become a new bar to annulment.

514, at p. 518, where in a second suit the husband was estopped from denying his own adultery which had been found in the first suit, although a jury in the second suit found him not guilty of adultery; (but see next point).

<sup>1</sup> But, although the Court cannot be bound by such estoppel, it is in no way bound to give relief to a party who is estopped from denying guilt. The Court is unfettered by estoppels between the parties or binding on one party, *Harriman v. Harriman*, [1909] P. 123 (C.A.), p. 142, *per* Fletcher Moulton, L.J.; *Rutherford v. Rutherford* (*Richardson intervening*), [1922] P. 144 (C.A.), *per* Warrington, L.J., at p. 155; [1923] A.C. 1 (H.L.).

<sup>2</sup> But a covenant may be more committal than condonation, because a condoned offence (*vide* Chapter III (ii) of this Section) may be revived by a smaller offence than would be necessary for the foundation of a petition in the first instance. But a covenant not to revive the suit has not been allowed to bar revival of the offence in a suit on the ground of further offences (*Norman v. Norman*, [1908] P. 6). See pp. 175-6.



## CHAPTER II

### BARS TO ANNULMENT

#### (JURISDICTION: DOMICIL)

It will be plain that suits for annulment are *sui generis*. Such suits will, of course, be barred if the Court lacks jurisdiction, or if the petition is not supported by sufficient evidence. Yet it is testimony to the peculiarity of nullity suits that, although a respondent who is alleged to be impotent refuses to submit to a medical inspection, the cases show that the Court may still grant a decree on the evidence of the petitioner, or adequate proof.<sup>1</sup> In the case of a void marriage the nullity is a fact, and the decree of the Court is not essential, although it is valuable for record and may be requisite in proof. To establish the Court's jurisdiction it has been sufficient that either (1) the marriage was celebrated in England, or (2) the parties are resident in England, or (3) the domicil of the parties is English. In the event of the fulfilment of none of these conditions, the English Court cannot admit jurisdiction, and the parties will find their appropriate Court elsewhere. This absolute bar implied by the Court's lack of jurisdiction is, in view of the variety of tests, plainly remote; and, according to the inherited ecclesiastical practice, would have appeared likely so to remain. But recent decisions have shown a strong tendency to import into nullity suits the last of these tests of jurisdiction as indispensable. This test of domicil has hitherto been proper to suits for dissolution, but, although valid in cases of nullity, has not only not been requisite save in the absence of either of the simpler tests, but in the nature of the case has formerly been regarded as needless and obstructive.

Domicil is more than residence. It requires the further condition of intention to continue in the place, country or recognized territorial unit of residence.<sup>2</sup> There is a presumption in favour of domicil of origin, but a new domicil is acquired by law when a woman marries and thus takes the domicil of her husband.

<sup>1</sup> *Sparrow (falsely called Harrison) v. Harrison* (1841), 3 Curt. 16; *E. v. E. (otherwise T.)* (1900), 50 W.R. 607; *S. v. S. (otherwise M.)* (1908), 24 T.L.R. 253.

<sup>2</sup> *Att.-General of Alberta v. Cook*, [1926] A.C. 444. The domicil of a person in Canada is the particular province in which he or she has settled.

A change of residence does not constitute a change of domicile unless there is evidence of intention to make the new place of residence permanent. If, for example, the husband only, or both the parties to a marriage, were domiciled abroad at the time of the marriage, but were married in England, continuous residence in England after the marriage would probably be held to constitute domicile; but when, as in *Bell v. Kennedy*,<sup>1</sup> one whose domicile of origin was Jamaica, left that country permanently and resided for a year in Scotland, the House of Lords held that it was not certain that Scotland was his domicile. Neither residence alone nor intention alone is sufficient. It is to be noted that there is no British domicile; but each of the units of the British Empire, even including Scotland and Ireland, is foreign from the point of view of English domicile. The English law of domicile imposes its own rule of domicile to test the validity of the jurisdiction of courts in countries where the accepted test of jurisdiction is nationality or residence, either of which is much simpler.

The incidence of the law of domicile upon suits for nullity (as upon suits for judicial separation) in accordance with the old ecclesiastical practice has been less restrictive than upon suits for dissolution. In suits for nullity the Court need not enquire into the domicile or residence of the parties if the marriage was celebrated in England; and if the marriage was celebrated abroad, the Court could hear the suit, provided either that both parties were domiciled in England at the commencement of the suit, or that the respondent was resident in England. Cases show that nullity suits have been entertained on the grounds of inadequate marriage formalities,<sup>2</sup> consanguinity,<sup>3</sup> and bigamy,<sup>4</sup> where none of the parties (apparently) were domiciled in England, but where in each case they had been married in this country. In all these cases the marriage in England gave jurisdiction to the English Court, and although in each case the *lex loci celebrationis* prevailed, in *Sottomayer's* case this was dependent on domicile. In this case it was held at the first hearing that the marriage (of first cousins) was valid, as it would be by the *lex loci*. But the marriage of first cousins was an *impedimentum dirimens* in Portugal, where the parties were

<sup>1</sup> (1868), L.R. 1 Sc. App. 319.

<sup>2</sup> *Simonin v. Mallac* (1860), 2 Sw. & Tr. 67.

<sup>3</sup> *Sottomayer v. de Barros* (1877), 3 P.D. 1, C.A. (but on a second trial it was found that the husband was domiciled in England).

<sup>4</sup> *Linke v. Van Aerde* (1894), 10 T.L.R. 426.

presumed to be domiciled; and on Appeal the marriage was held to be void by the law of domicil. But the case was referred back, and the President of the Divorce Division found that the husband was in fact domiciled in England at the time of the marriage, and on that account the marriage was upheld. Thus the *lex loci celebrationis* was not prevented from prevailing. The point appears to be that the *lex loci contractus* prevails *quoad solemnitates*, but takes cognizance of the *lex domicilii* when that law raises an *impedimentum dirimens*; *sed aliter* in *Simonin v. Mallac (supra)*, where the French impediment was *impeditivum*. Thus, apparently, had the husband in *Sottomayer's* case been, as supposed at first, domiciled in Portugal, the marriage would have been void, because, while the *lex loci celebrationis* determines the forms requisite for marriage, the law of the domicil determines the capacity to contract it, except in so far as the *lex domicilii* might permit a marriage which would not be valid by the *lex loci*.

An outstanding and complicated case at a later date was originally, so far as the English Court is concerned, an example of lack of domicil as a bar to dissolution. But it involves discussion of the question of nullity, for, although the marriage was annulled at the instance of one party, the nullity did not set the other free, and the law of domicil barred the relief of the second by dissolution. This case of *Ogden v. Ogden (otherwise Philip)*,<sup>1</sup> shows also that the English law of domicil is a principal source of private international embarrassment. An English woman, domiciled in England, married Philip, a domiciled Frenchman, and the marriage took place in England. But, on the ground that the French husband, being under twenty-five years of age, had not obtained the consent of his parents, the marriage was annulled by a French Court; and Philip forthwith married a Frenchwoman in France. The English wife was not unmarried by the French nullity, because the marriage had been celebrated legally in England and the particular French formality was not required by the English Law. In 1904 she brought a suit for dissolution on the ground of the adultery and desertion of her husband. But by English Law it is a pre-requisite for jurisdiction in a suit for dissolution that the domicil of the parties be English; and, although the 'husband' had a lawful wife in France, the suit was dismissed by the English Court for lack of jurisdiction. After the case had been dismissed,

<sup>1</sup> [1908] P. 46; 97 L.T. 827.

the English wife, then treating the French decree of annulment as valid in England, assumed her marriage to be void. She described herself as a widow and married a domiciled Englishman. He, on learning the truth, petitioned for an annulment,<sup>1</sup> and the Court of Appeal held that the second marriage was bigamous, and therefore null and void, on the ground that the *lex loci contractus* in the case of her first marriage determined her status as a married woman. Thus this Englishwoman, married, yet without a husband, and barred from relief by divorce, would then be able to consider only those forms of relief of which domicile was not, or was not presumed to be, a condition. Of these, nullity would be ruled out because the original marriage was valid and the man was not impotent. So that there would remain only: (1) Judicial Separation, which would depend on the respondent's being present in England at the commencement of the suit—a most unlikely concession on his part, and (2) the precarious expedient of a suit in the foreign Court, where already the marriage had been pronounced void, and where, therefore, the 'wife' would have no status as a petitioner.

In the recent case of *Salvesen or Von Lorang v. Administrator of Austrian Property*,<sup>2</sup> a domiciled Scotswoman had married a domiciled Austrian in Paris in 1897. After the War, in which the husband had fought, the Administrator of Austrian Property laid a claim to the wife's moveable property in Scotland, holding her to be an Austrian national. The wife brought a suit for nullity in the Court at Wiesbaden, which was the domicile of both of them, on the ground of lack of formalities in their marriage in Paris, and the Court pronounced the marriage null and void. An action of multiple poinding was brought in the Scottish Court to determine the ownership of the property;<sup>3</sup> and on Appeal the House of Lords decided that the German decree of nullity was binding on the Scottish Courts, and the woman was not the Austrian's wife.

But, it may be asked, why should the nullity pronounced in the German Court be held binding on the Scottish Courts, when the French decree of nullity in *Ogden v. Ogden* was disallowed in the English Courts? Both decrees were granted on the ground of irregularity. Therefore both marriages were void *ab initio*, and were not, as in the case of incapacity, voidable marriages. In *Ogden's* case the marriage had been celebrated in England, and

<sup>1</sup> 96 L.T. 505.

<sup>2</sup> [1927] A.C. 641.

<sup>3</sup> (1926), S.C. 598

the French nullity had been pronounced on the ground of an irregularity, lack of parental permission, which was not an *impedimentum dirimens*, and would not have voided the marriage in England. Therefore the marriage was held still to be valid in England. Here a difference lies between *Ogden's* case and *Salvesen's*, but in the light of the decision and *dicta* in *Salvesen* the question arises whether or not the issues in *Ogden*, jurisdiction and status, would now be decided as in 1904 and 1908. But *Salvesen's* case was by way of answer to a claim to property, which depended on whether the wife were still a wife or not. This case, then, turned on the validity of the decree of nullity pronounced in the Court at Wiesbaden. Domicil is necessary to a dissolution, because a dissolution involves a judgement *in rem*, i.e. (in such a case) a change of status, the *res* being the status of marriage; and such a judgement pronounced by a competent Court, the Court of domicil, is universally valid. At Wiesbaden the Court of the parties' domicil was held to have given a judgement *in rem*, affecting the status of the parties. The decision that the decree of nullity bound the Scottish Courts was, of course, fortunate for the Scottish 'wife,' for it settled the question that her property was her own because she was not a wife. But the decision involved a new view of the conception of nullity. That which had hitherto been entertained was that a decree of nullity, unlike a decree of dissolution, does not dissolve a marriage but pronounces it void, and says in effect that it has never been a marriage, that the parties have never occupied the married status, and therefore do not suffer a change of status by the decree. The new view is that although a decree of nullity does not dissolve a marriage, but pronounces it void, and therefore declares that it has never been a marriage, yet that distinction is a matter of form, and the true principle is that of dissolution. Therefore, if the decree is pronounced by a competent Court, the Court of domicil, it is a judgement *in rem*, declaratory of status; and, if it is not pronounced by the said Court of domicil, it is not a judgement *in rem*, and its universal validity is doubtful.

(N.B.—'Doubtful,' but not necessarily in every case excluded; for it is implied by Lord Haldane in *Salvesen's* case ([1927] A.C. 641, at p. 654) that other jurisdiction than that conferred by domicil may be possible in restricted instances of nullity suits, although that question did not then lie for determination.)

Cases of nullity, as we have noted on a previous page, have been more free from the disadvantages of domicile than suits for dissolution for which domicile is the requisite condition of jurisdiction. Suits for nullity have been entertained by the Courts on the inherited principles of the old ecclesiastical practice which provided this escape in the days of the professed indissolubility of marriage. But *dicta* expressed in *Salvesen's* case, together with the decision in an even more recent nullity suit, would go a long way towards placing nullity suits on the footing of suits for dissolution. Indeed, if these *dicta* be not dismissed as *obiter*, they point to a tendency to eliminate the distinction between void, voidable and valid marriages.

A case of considerable public interest in 1930 has introduced a new exception to the practice of legal hospitality to petitions for nullity. It will have been observed that none of the cases so far cited have been suits on the ground of impotence. If a marriage is void *ab initio*, it does not necessarily need a decree, as in the case of consanguinity and bigamy. If the ground is impotence, the marriage is voidable; but a decree of nullity renders it void *ab initio*. In the case of *Inverclyde (otherwise Tripp) v. Inverclyde*,<sup>1</sup> when the parties had been married in England, and the husband's domicile was Scotland, the wife's suit was for nullity on the ground of the husband's impotence, and for alimony *pendente lite*. The husband took out summonses against the principal petition on the ground of his Scottish domicile, and against the wife's petition for alimony *pendente lite* on the ground that this would not be entertained in Scotland. The Court dismissed both the petitions of the wife on the ground that, unlike marriages which were void *ab initio*, this was an originally valid marriage which the petitioner sought to render void; and that a decree of nullity would, like a decree of dissolution, change the status of the parties, and that therefore only domicile could give jurisdiction. It was argued for the petitioner that a decree of nullity on the ground of impotence rendered a marriage void *ab initio*, and thus had the effect of declaring that there had never been such a marriage; that this was in fact the canonical consequence of a marriage unconsummated owing to impotence under the old ecclesiastical jurisdiction, that under that jurisdiction marriage or residence was sufficient, and that if the Court exercised jurisdiction and declared a nullity, the Scottish Courts could not dispute the decree.

<sup>1</sup> [1931] P. 29; 47 T.L.R., p. 140.

From this argument it would follow that if the English domicil of the petitioner were required, it might be shown to be a fact, because a decree of nullity would mean that the wife's domicil would not have become that of her husband, but would have remained English. It may also be emphasized at this point that the parties had been married in England, and also were resident in England alternatively with Scotland, and that therefore the customary jurisdiction in nullity suits would have been valid on one certain, and a second possible, count. The element of marriage within the jurisdiction, which would normally have been sufficient in a nullity suit, was guaranteed, although no precedent could be found of a nullity suit on the ground of incapacity where the parties had not been of English domicil.

In rejecting the argument of the petitioner's counsel, the Court appears to have set aside the old interpretation of nullity, and to have adopted a new view, viz. that while the distinction is to be maintained between void and voidable marriages, the distinction between voidable marriages, which are voided by decree of nullity, and valid marriages, which are dissolved by divorce, is one not of principle but of form. Such is indeed the purport of the learned Judge in *Inverclyde v. Inverclyde*, ([1931] P., at p. 42; 47 T.L.R., at p. 143):

'The marriage being voidable not void, and the decree affecting and involving an alteration of status, and being a judgement *in rem* binding on all the world, there can be no jurisdiction in this Court unless the parties are domiciled in this country. It seems to me that if the principle that jurisdiction depends on domicil in a suit for dissolution by divorce is sound, it must equally so depend in a suit for dissolution of marriage for impotence. To call it a suit for nullity does not alter its essential and real character, namely, a suit for dissolution. That is a mere difference in form . . .'

The effect of this judgement, assimilating suits for nullity on the ground of impotence to suits for dissolution, is that any Englishwoman who marries a foreigner with a foreign domicil, and finds him to be impotent, will be barred from suing for nullity except in the Court of her husband's foreign domicil.<sup>1</sup>

<sup>1</sup> Such is the effect; and as a matter of legal fact there is no necessity at this point to add to the statement. But it may be noted that the judgement, although the first on the precise point, was not a judicial innovation, because the Judge felt that the precedent of *Salvesen's* case settled the question of the indispensability of domicil, and he therefore held himself to be concluded in a case where, on the argument, a decree would affect the status of the parties.

## CHAPTER III

### BARS TO DISSOLUTION

#### (i) JURISDICTION (DOMICIL)

The initial bars briefly enumerated at the head of this Section of course apply to suits for dissolution, and the requisite jurisdiction of the Court depends on proof of the English domicil of the husband at the commencement of the proceedings. The definition of domicil in the last chapter will not now require repetition. Although in *Niboyet v. Niboyet*<sup>1</sup> the Court of Appeal held that the English Court had jurisdiction to dissolve the marriage of parties who had a *bona fide* matrimonial home in England, but were not domiciled in this country, the Judicial Committee of the Privy Council in *Le Mesurier v. Le Mesurier*<sup>2</sup> held that the only test of jurisdiction for the decree of dissolution is the domicil of the parties at the time of the suit.

The case of *Ogden v. Ogden*<sup>3</sup> occurs in one or other of its aspects in every discussion of domicil in relation to the law in Matrimonial Causes. Here, where a wife, whose domicil had been English and who had married a Frenchman domiciled in France, petitioned for the dissolution of her marriage (on the ground of adultery and desertion) owing to its annulment in France and the re-marriage of her French husband, the relief was refused on the ground of the lack of English domicil. As we have seen in the previous treatment of this case,<sup>4</sup> neither in the first case could the Court entertain a petition for dissolution, nor in 1908 could it recognize the French nullity; and the wife remained without a husband and yet was barred from re-marriage. In this case Lord Gorell re-stated in other words the principle which he had enunciated in *Armytage v. Armytage*,<sup>5</sup> viz., that

'the Court does not now pronounce a decree of dissolution when the parties are not domiciled in this country, except in favour of a wife deserted by her husband, or whose husband has so conducted himself towards her that she is justified in living apart from him, and who up to the time when she was deserted, or began so to be, was domiciled with

<sup>1</sup> (1878), 4 P.D. 1.

<sup>2</sup> [1895] A.C. 517.

<sup>3</sup> [1908] P. 46.

<sup>4</sup> Book II, Section II, Chapter II.

<sup>5</sup> [1898] P. 178.



her husband in this country,' . . . in which last case 'it is considered that in order to meet the injustice which might be done by compelling a wife to follow her husband from country to country, he (the husband) cannot be allowed to assert for purposes of the suit that he has ceased to be domiciled in this country.'

Already Lord Cranworth in 1859 had introduced this doctrine in *Dolphin v. Robbins*,<sup>1</sup> and Sir Robert Phillimore had followed in *Le Sueur v. Le Sueur*.<sup>2</sup> These cases, with the exception of *Ogden v. Ogden*, involved change of domicile. In *Ogden v. Ogden*, where it was thought that the principle enunciated might have been made to apply, the husband did not set up a new domicile; and, even if the annulment by the French Court and the re-marriage of the husband could be construed as desertion of the wife by the husband, the doctrine advanced in the cases quoted was not followed. In other cases it has been advanced, but has been disapproved;<sup>3</sup> and if a final decision were needed, it was given in *Horn v. Horn*,<sup>4</sup> where the issue of domicile was tried with the petition. As in the other relevant cases, it was not the need for domicile which was in question—for that had been established in *Le Mesurier v. Le Mesurier* (*supra*)—but the question was whether the husband respondent's domicile was English or French. The husband and wife were born, married and domiciled in England. In 1921 the wife obtained a decree of judicial separation. In 1928 she brought a suit for dissolution.<sup>5</sup> The husband appeared under protest and pleaded that he had acquired a French domicile. The President ordered a trial of this issue, which would determine also that of the consequent title of the wife to sue for relief in the English Court. In 1929 the French domicile of the husband was successfully established; and since separation does not discharge the domicile which a wife takes from her husband,<sup>6</sup> the wife's petition was dismissed for lack of jurisdiction.

In these cases the need of domicile to establish jurisdiction was clearly not in doubt. The question, raised in the interests of a

<sup>1</sup> (1859), 7 H.L.C. 390.

<sup>2</sup> (1876), 1 P.D. 139.

<sup>3</sup> In *re Mackenzie*, [1911] 1 Ch. 578; *Lord Advocate v. Jaffrey*, [1921] 1 A.C. 146.

<sup>4</sup> (1929), 141 L.T. 93.

<sup>5</sup> *H. v. H.*, [1928] P. 206.

<sup>6</sup> *A.-G. of Alberta v. Cook*, [1926] A.C. 444; *pace* Professor Westlake, *Private International Law* (7th ed.), p. 346: 'the domicile of a wife, not judicially separated *a mensa et thoro*, is that of her husband,' a statement which carries an implication which has not been upheld by recent decisions and is therefore not good law.

wife hitherto sharing her husband's domicile, was whether or not her husband's change of domicile could be admitted as a defence in cases where it would disallow the jurisdiction of the English Court to hear the wife's suit, and the decision is that the husband's change of domicile bars a wife's suit. But on the main issue the decision in *Le Mesurier v. Le Mesurier* (*supra*) was reaffirmed by the *dictum* of Lord Phillimore in *Salvesen v. Administrator of Austrian Property*<sup>1</sup> that

'the law of England recognizes the competence and exclusive competence of the Court of the domicile to decree dissolution of a marriage.'

There is no question here, as has arisen in nullity suits, whether or not domicile is a requisite condition of jurisdiction. The English Court can dissolve a marriage which was celebrated abroad when the domicile of the parties was foreign, provided that their domicile is English at the institution of the suit. The parties need not be British subjects, and the adultery may have taken place abroad. But for the purpose of jurisdiction, domicile is the indispensable requisite, and the lack of domicile is an insuperable bar.

## (ii) ABSOLUTE BARS

We now proceed to consideration of the Absolute Bars to Relief. It was a principle of the Canon Law that relief should be given to one party by reason of the injury inflicted by the other; *volenti non fit injuria*. Although the new Statute Law provided ground for the dissolution which had been recognized only under the cumbrous procedure of an Act of Parliament, and is distinct from the nullity which had been obtainable in the Ecclesiastical Courts, it adopted the principles of the Canon Law in the administration of the new Statute. The aim of these principles is to rule out every element of mutual consent between the parties; therefore those who seek dissolution or separation must come to Court as adversaries.

By the Judicature (Consolidation) Act, 1925, s. 178, which re-enacts the Matrimonial Causes Act, 1857, ss. 29, 30, 31, it is the duty of the Court, when a petition is presented by either husband or wife, to hear evidence in order to satisfy itself upon

<sup>1</sup> [1927] A.C. 641, at p. 665.

the alleged facts and to determine whether or not the petitioner has been accessory to the adultery complained of, or has connived at it or condoned it. And if any counter-petition is brought against the petitioner, it is the duty of the Court to enquire into this.

If the Court is not satisfied in favour of the petitioner on these issues, or on that of collusion between the petitioner and either of the respondents, it will dismiss the petition. (Thus, even if the adultery is proved, the decree may be barred.) (S. 178 (2).)

If the Court is satisfied on all these issues, it will pronounce a decree of divorce. (Yet after a decree *nisi* the same bars may be raised to prevent a decree absolute.) (S. 178 (3).)

We proceed to set out the Absolute Bars of Connivance, Collusion and Condonation.

(a) Connivance is a bar to relief if the Court finds that the petitioner has been accessory to, or conniving at, the adultery of the respondent; and this applies to petitioners for dissolution just as it applied to petitioners under the old ecclesiastical practice from which this bar was inherited. The connivance of a husband at a wife's adultery will bar the husband's suit for dissolution or judicial separation, but it will not prevent the wife from obtaining an order for separation and maintenance under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895-1925. But connivance is not a good answer to a petition unless there is evidence of intention to encourage the adultery. The element of intention distinguishes connivance from conduct which unintentionally but carelessly conduces to the guilt of the other party. Conduct conducing admits of a large definition, but properly arises under the Discretionary Bars. This element of intention has been impressed in such definitions of connivance as have been given from the Bench. The principle of law which determines the definition of connivance is *volenti non fit injuria*. As long ago as 1792 the Judge said in *Moorsom v. Moorsom*:<sup>1</sup> ' . . . though to bar the husband there must be intention on his part, I have no difficulty in saying that mere passive connivance is as much a bar as active conspiracy; he would be *particeps criminis*.' Again, in *Rogers v. Rogers*,<sup>2</sup> 'Passive acquiescence would be sufficient to bar the husband, provided it appeared to be done with the intention and in the expectation that she would be guilty of the

<sup>1</sup> (1792), 3 Hag. Ecc. 87, 107.

<sup>2</sup> (1830), 3 Hag. Ecc. 57.

crime.' Again, in *Boulting v. Boulting*,<sup>1</sup> Sir Cresswell Cresswell said: 'Now connivance is an act of the mind; it implies knowledge and acquiescence.' And if mere negligence of the wife is not connivance, studied negligence amounting to encouragement and shown by speech and habits may constitute connivance; for as the same Judge said in the same case, 'It may be proved by express language or by inference deduced from facts and conduct.' Granted the nature and definition of connivance, it need not be an incentive to misconduct with any particular person.<sup>2</sup> From this it might seem to follow that if connivance has once been proved, the petitioner whose suit is thus barred continues to be barred and can never bring a suit on the ground of the adultery of the party at whose guilt he or she has once connived. Twenty years later Lord Westbury, Lord Chancellor, gave this impression in the case of *Gipps v. Gipps and Hume*,<sup>3</sup> when he said: 'If a husband is proved to have connived at his wife's adultery with A, he cannot obtain a dissolution of marriage on account of her adultery with B.' Yet in fact the first connivance has not necessarily any connection with the second adultery. Indeed, the second adultery might take place with the same co-respondent as the first, after intermediate condonation of the wife's offence by the husband. In the circumstances of this case, although Lord Chelmsford regarded the Lord Chancellor's *dictum* as *obiter*, the House of Lords upheld the judgement of the Court below, and held that the petitioner had consented tacitly to the continuing adultery. Although the suggestion would not be warranted that connivance cannot constitute a continuing bar, there is nevertheless a tendency to more liberal interpretation of the bars to relief; and if an analogy may be drawn from the fact that pre-marital cohabitation requires *exacta diligentia* on the part of a husband in the care of his wife during the marriage (as illustrated by *Dillon v. Dillon*,<sup>4</sup> and *Hawkins v. Hawkins and Hopes*), to establish the corresponding duty of a husband after his wife's adultery, at which he had connived but which he afterwards condoned, it is not certain that the Court would allow the presumption of connivance unless there were renewed evidence of it. The case of *Gifford v. Gifford and Freeman*<sup>5</sup> seems not to be conclusive

<sup>1</sup> (1864), 3 Sw. & T. 329.

<sup>2</sup> *Stone v. Stone* (1844), 3 Notes of Cases, 278.

<sup>3</sup> (1864), 11 H.L.C. 1, p. 13.

<sup>4</sup> (1842), 3 Curt. 86.

<sup>5</sup> (1885), 10 P.D. 177.

<sup>6</sup> (1927), 43 T.L.R. 141.

on this point; for when a petitioner's first suit had been dismissed as collusive, because he had accepted damages from a co-respondent and had agreed that no further damages should be claimed and that there should be no obstruction to the decree, the adultery between the respondent and the co-respondent continued, and the petitioner's second suit was barred by connivance. The President held that the agreement made by the petitioner deprived him of any just complaint against the continuing adultery.

(b) Collusion is a bar not easy to define. It is widely misunderstood and loosely employed. In the words of Sir Cresswell Cresswell, the Judge in *Jessop v. Jessop*:<sup>1</sup> 'It is not, like condonation, a well-understood term; it may be keeping back evidence of what would be a good answer in, by agreeing to set up a false case.' It implies an agreement between the parties to present a false case to the Court. The agreement may be known to the Court, and may involve no false statements of fact, and yet remain collusion.<sup>2</sup> Especially if the agreement be one not to defend the action, it is judged to be collusive, because in matrimonial causes any agreement, even if the petitioner's case be a good one, is in the nature of a false case, for an agreement not to defend has the effect of aiding, instead of resisting, the petitioner's cause. In the present state of the law, such agreement may be held to militate against justice, by obstructing enquiry into what the Court requires to know, in order to avoid pronouncing a decree contrary to the justice of the case.<sup>3</sup> In *Barnes v. Barnes*<sup>4</sup> it appears from the Judge's opinion that merely to give a wife money before and after the institution of the suit does not in itself constitute collusion; but to promise money on consideration of not defending is collusion. Yet an understanding and facilitating of proof, and even undertaking to provide money for an innocent wife, is not necessarily held to be collusion.<sup>5</sup> Collusion, like connivance, seems to involve an element of intention. The provision by one party, for the use of the other, of the evidence of adultery having been committed is not necessarily collusion; but the suggestion by one party that the other party should commit adultery in order to

<sup>1</sup> (1861), 2 Sw. & Tr. 301.

<sup>2</sup> *Butler v. Butler & Burnham (the Queen's Proctor intervening)* (1890), 15 P.D. 66 and [1894] P. 25.

<sup>3</sup> Judicature (Consolidation) Act, 1925, s. 181 (3).

<sup>4</sup> (1867), L.R. 1 P. & D. 505.

<sup>5</sup> *Scott v. Scott*, [1913] P. 52.

free the first would be collusion.<sup>1</sup> Collusion, where proved, is a bar to dissolution and even to judicial separation, but is not a bar to a fresh suit which is free from collusion.

The reference which we have just made to the element of intention which is common to both collusion and connivance takes us back to the older use of the term. In the practice of the old Ecclesiastical Courts before the Act of 1857, collusion had much in common with connivance, wherein one party was accessory to the adultery of the other. But collusion, as contemplated by the Act of 1857 (ss. 30 & 31) re-enacted in the Judicature (Consolidation) Act, 1925 (s. 178), has a larger reference. Collusion now covers not only cases where the petitioner and the respondent conspired to furnish the ground of the petition, but cases where the parties agreed to use an existing ground. It is the agreement between the parties which constitutes the collusion; and where the agreement is proved, the suit is collusive and the petitioner barred. It is thus a rather shadowy line which separates collusive suits from those wherein the respondent merely furnishes evidence of guilt for the petitioner to use. The so-called 'hotel evidence' frequently follows from presumably collusive agreements; yet as in *Scott v. Scott* (*supra*) there is often no more on the surface than the furnishing of proof which, in that case, where a wife had already obtained a judicial separation on the ground of cruelty and desertion, was held not to be collusion.

(c) Condonation is a term more readily understood, but comes from the previous ecclesiastical practice with a technical significance in Matrimonial Causes. Condonation is a bar to relief if a husband or wife has forgiven the other partner—to the point of restoring her or him to the status formerly occupied—for such matrimonial offences as he or she knows or believes to have been committed. The forgiveness, or condonation, must carry the expressed or understood condition that there will be no further matrimonial offence. (If there be an agreement in the form of a binding covenant, not to sue in respect of past offences, this may act as an estoppel,<sup>2</sup> and will then be more effective than condonation, for it will mean that only further offences will be valid grounds for a petition. But if the agreement be in the form

<sup>1</sup> *Laidler v. Laidler* (1920), 36 T.L.R. 510.

<sup>2</sup> *Rowley v. Rowley* (1864), 3 Sw. & Tr. 338; *Rose v. Rose* (1883), 8 P.D. 98 (C.A.). *L. v. L.*, [1931] P. 63.

of a covenant not to revive the former offence, but without reference to future offences, it will not exclude revival if future offences are committed.<sup>1</sup> Further than this, however, an agreement not to sue in respect of further offences is a permission for future misconduct, and is void; or it may raise the presumption of connivance. If the covenant not to sue in respect of past offences is accompanied by a provision that it shall become void if the parties are afterwards judicially separated, the wife may sue forthwith for dissolution, on the grounds of her husband's adultery after and cruelty before the execution of the deed of agreement, without first obtaining a judicial separation.<sup>2</sup> Thus a covenant not to take proceedings on account of past offences will not always act as an Estoppel.) Since condonation requires forgiveness, it is not implied in respect of one ground of offence by a successful suit on another ground. A decree of judicial separation given to a wife on the ground of adultery does not condone either cruelty or desertion on the part of her husband;<sup>3</sup> and since forgiveness is implied by cohabitation, disobedience to an order for restitution of conjugal rights is condoned by cohabitation; but a further matrimonial offence will revive the disobedience. If, however, condonation be not followed by revival, it is a bar to both dissolution and judicial separation.

To constitute a bar, condonation must take the form of complete forgiveness, i.e. as well in act as in word.<sup>4</sup> It means the restoration of the offender to his or her former state. This may or may not require evidence of renewed sexual intercourse, but it does demand the evidence that the parties are living together as husband and wife, and not merely under the same roof.<sup>5</sup>

Revival after condonation does not necessitate the repetition of the same matrimonial offence.<sup>6</sup> Indeed, an offence of less degree than would be required to found a petition may constitute revival, but such offence must be serious enough to carry the suggestion that repetition of the previous offence is likely.

Condonation without revival disallows a petition for dissolution on the ground of the condoned and unrevived offence. But

<sup>1</sup> *Norman v. Norman*, [1908] P. 6.

<sup>2</sup> *Dowling v. Dowling*, [1898] P. 228.

<sup>3</sup> *Green v. Green* (1873), L.R. 3 P. & D. 121; *Fullerton v. Fullerton* (1922), 39 T.L.R. 46.

<sup>4</sup> *Crocker v. Crocker*, [1921] P. 25 C.A.

<sup>5</sup> *Bateman v. Ross* (1813), 1 Dow. 235.

<sup>6</sup> *Furness v. Furness* (1860), 1 Sw. & Tr. 61.

although condonation of the offence committed with one person is a valid bar in the absence of revival, it does not bar a petition in respect of an offence committed with another person.

The effect of all these complications is considerably to curtail the liberty which the reforms of the Act of 1857 and its successors appeared to effect. The codified law of the Judicature (Consolidation) Act of 1925 has simplified the Statutes, but has in no wise reduced the generally prescriptive right of the Canon Law principles to govern present practice.

### (iii) NEW RULE IN *RUSSELL v. RUSSELL* (1924)

It would not be technically true to speak of a rule of evidence as a bar, but it may be said that the new rule established in *Russell v. Russell*<sup>1</sup> operates to that effect. It is an old rule in legitimacy suits that the spouses are not valid witnesses of non-access such as would bastardize a child. In *Russell v. Russell*, by a majority of three Law Lords to two, this rule was extended to suits for divorce. Lord Sumner's dissenting speech has proved to be prophetic, that the decision would cause great hardship to persons who could not obtain adequate proof in place of their own evidence. It means that a husband petitioner, who has not had access at the time requisite to account for the birth of a child by his wife, is barred from giving evidence to that effect; and if he cannot produce evidence, which may be expensive, the relief will be barred. Of course, the rule applies only where the question of paternity of a child is at issue. The judgement of the Court in a divorce suit would not of itself bastardize the child, for a legitimacy suit would be necessary for that purpose. But this does not affect the incidence of the rule which, in a case where paternity is at issue, will operate as a bar in the absence of satisfactory evidence. When there has been free access, even the confession of a wife that the husband was not the father of the child is not admissible as against the presumption of legitimacy.<sup>2</sup>

### (iv) DISCRETIONARY BARS

In addition to these Absolute Bars the law provides a number of Discretionary Bars which may be used by the Court as grounds

<sup>1</sup> [1924] A.C. 687 (H.L.).

<sup>2</sup> *Warren v. Warren*, [1925] P. 107.



for refusing relief to those who otherwise would be entitled to it. It was a principle of the Canon Law that petitioners must come to Court with clean hands, and could not be certain of relief, however good otherwise the case might be, if they were open to certain charges. This principle survived the Act of 1857 and still holds.<sup>1</sup> The Judicature (Consolidation) Act, 1925, s. 178 (3), reproduces the discretionary clauses from s. 31 of the Act of 1857 in the following form:

'Provided that the Court shall not be bound to pronounce a decree of divorce if it finds that the petitioner has during the marriage been guilty of adultery, or if in the opinion of the Court he has been guilty—

- (a) of unreasonable delay in presenting or prosecuting the petition ;
- (b) of cruelty towards the other party to the marriage ;
- (c) of having without reasonable excuse deserted, or of having without reasonable excuse separated himself or herself from the other party before the adultery complained of ; or
- (d) of such wilful neglect or misconduct as has conduced to the adultery.

Apart from the fact that a plea of poverty is a good defence to the charge of unreasonable delay, it may be said of all these discretionary bars that the worse the conditions of the marriage, the less the likelihood of relief; or as Dr. Havelock Ellis has written: 'The safest way in England to render what is legally termed marriage absolutely indissoluble is for both parties to commit adultery.'<sup>2</sup> This apparent absurdity (happily qualified by recent practice) consists with the Canon Law principles of relief only for an injured party who is innocent and punishment for the party who is guilty. It is still evident in a relative degree in the operation of the discretionary bars. However good be the petitioner's case in proof of the alleged offence, the relief will be jeopardized if he or she has been found to have committed adultery during the marriage, or if the petition is not presented with alacrity (for the law gives relief *vigilantibus non dormientibus*), or if there is evidence of cruelty, desertion, neglect or conduct conducing by the petitioner. With the exception of undue delay in presenting or prosecuting the petition, each of these grounds may constitute a form of conduct conducing, but they are distinguished

<sup>1</sup> *Clarke v. Clarke and Clarke* (1865), 34 L.J. (P.M. & A.), 94, *infra*.

<sup>2</sup> *Psychology of Sex*, Vol. VI, p. 452 n.

from the absolute bar of connivance in the measure in which they leave the element of positive intention an open question. Therefore they have not the completely prohibitive effect of absolute bars, but rather concern cases on the border line which are left to the Court's discretion.

Thus cruelty or desertion on the part of a petitioner, occurring before the respondent's alleged adultery, may be, but is not necessarily, a bar to relief. Again, such wilful neglect or misconduct as has conduced to the adultery is not necessarily a bar to relief; for, if it were so, it would be an absolute and not a discretionary bar. For example: where a wife had been infected with venereal disease by her husband, and had afterwards committed adultery with a co-respondent, the husband was refused a decree;<sup>1</sup> but where a husband who had indulged in long absence from his wife, but had supported her in his absence, petitioned on the ground of his wife's adultery when she had taken to drink and had an illegitimate child, the Court found conduct conducing, but granted a decree subject to the husband's making his wife an allowance *dum sola et casta*<sup>2</sup> (i.e. while she remained unmarried and chaste). The cases show how conduct conducing may be held by the Court to be a bar, or may be considered to be insufficient ground on which to refuse a decree.

The discretionary bar which has been the most in evidence is that of the petitioner's adultery. This furnishes a great many cases of both husbands and wives whose petitions have secured a decree or have met with the refusal of relief. After the passing of the Act of 1857, the discretionary bars were used with great severity against guilty petitioners. The terms of the Act signified that, granted the requisite proof of the respondent's guilt, and in the absence of any of the absolute bars, the Court should pronounce a decree; but that the Court had a discretion not to pronounce such a decree in the event of its finding any of the discretionary bars. For many years after this Act the Court interpreted the discretion very narrowly.

In 1869, the Judge Ordinary, Lord Penzance, in the case of *Morgan v. Morgan and Porter*<sup>3</sup> laid down rules which governed the Court through many years. In that case he admitted only three grounds for the legitimate exercise of the discre-

<sup>1</sup> *Willey v. Willey & Ryder* (1878), 26 W.R. 239.

<sup>2</sup> *Parry v. Parry*, [1896] P. 37.

<sup>3</sup> (1869), L.R. 1 P. & D. 644.

tion (i.e., as it was understood to be, in favour of petitioners), viz., those—

(1) In the case of *Joseph v. Joseph and Wentzel*,<sup>1</sup> where the petitioner, supposing his wife to be dead, married again;

(2) In *Coleman v. Coleman*,<sup>2</sup> where the petitioner had been compelled by her husband to live as a prostitute; and

(3) In *Anichini v. Anichini*,<sup>3</sup> where the petitioner's adultery had been condoned and had not contributed to the lapse of the guilty spouse.

Lord Penzance appears to have expressed a doubt in the case of (3), but subsequent practice has upheld it. And even if, as he hazarded, other classes of cases might admit of discretion, they were threatened by the principle of the Canon Law, which had been re-enunciated in *Clarke v. Clarke & Clarke (supra)*—where a petitioner, who sought a dissolution on the grounds of his wife's incest, confessed that he had committed one act of adultery after his wife's alleged offence—that petitioners must come to Court with clean hands, and that therefore discretion in favour of a petitioner who had been guilty of adultery during the marriage was not the practice of the Court. The doubtful case of *Anichini v. Anichini (supra)* had come under the jurisdiction of the Ecclesiastical Courts, and was strictly an illustration of divorce *a mensa et thoro*, now judicial separation; but the principle has been followed in practice that, if the petitioner's adultery has been condoned and has not contributed to the adultery of the respondent, the decree of dissolution will not be refused. After the precedents thus cited and approved by Lord Penzance, practice came to add another precise and limited case, viz., that, as in *Symons v. Symons (The Queen's Proctor Intervening)*,<sup>4</sup> a wife petitioner should not be refused a decree if the respondent husband had conduced to her adultery by his own misconduct or wilful neglect. This decision was followed in *Constantinidi v. Constantinidi and Lance*,<sup>5</sup> where the President, Sir Francis Jeune (afterwards Lord St. Helier), declined to admit any specific limitation to the discretion of the Court, but laid down the following principles: (1) that a petitioner whose adultery has seriously contributed to the misconduct of the respondent cannot rightly expect the exercise of the discretion in his favour; nor should a respondent who was in a serious degree responsible for the

<sup>1</sup> (1865), 34 L.J. (P.M. & A.) 96.

<sup>2</sup> (1839), 2 Curt. 210.

<sup>3</sup> (1866), L.R. 1 P. & D. 81.

<sup>4</sup> [1897] P. 167.

<sup>5</sup> [1903] P. 246.

guilt of a petitioner be allowed to escape the consequences of proved misconduct by alleging that of the petitioner; and (2) that a wife's desertion of her husband and her adultery with another man, when the husband correctly assumes the true state of affairs, is in a serious measure responsible for the husband's adultery. The exercise of the discretion in this case suffered criticism in the Court of Appeal;<sup>1</sup> and thus the principle of regarding the discretion as being limited to particular cases was not extended far beyond Lord Penzance's limits for many years, although the tendency was to use the discretion more favourably towards guilty petitioners, i.e. less frequently to refuse relief.

But although it was not until 1920 that the interpretation of the discretion was so enlarged as to take into account the true interests of the parties and of the family, an intermediate case came to clear the air to good purpose. The judgement in *Wickins v. Wickins*<sup>2</sup> so far expanded the conception of the discretion, which had been cramped by the classic pronouncement of Lord Penzance in *Morgan v. Morgan (supra)*, as actually to establish the position which Lord Penzance had rejected, viz., that the Court's discretion to grant or to refuse a decree could properly be governed by consideration of the question how far the petitioner's adultery was more or less excusable. In this case the Judge held that the discretion was unfettered, and that it was neither desirable nor possible to lay down definite and rigid rules for its exercise; and he was upheld in the Court of Appeal. This view was again taken by the President in *Tickner v. Tickner*.<sup>3</sup> This case was referred to the King's Proctor in order that the Court might hear a full argument from Counsel; and after a review of all the cases, the President reaffirmed the principle of unfettered discretion.

But in the case which proved to be a landmark in the history of discretion cases, the newly established principle of unfettered discretion was far from being the only feature.<sup>4</sup> The President indicated the grounds on which the discretion could rightly be exercised, and held in this case, where the guilty petitioner was the husband, that the discretion could properly take into account (1) the interest and benefit of the children, (2) the interests of the woman with whom the husband was guilty of misconduct

<sup>1</sup> [1905] P. 253, C.A.    <sup>2</sup> [1918] P. 265, C.A.    <sup>3</sup> [1924] P. 118; 40 T.L.R. 367.

<sup>4</sup> *Wilson v. Wilson*, [1920] P. 20; 36 T.L.R. 91.

(in order that she might marry him), (3) the probability that the refusal of a decree would not serve to reunite the guilty husband and the guilty wife, and (4) the possibility of the guilty husband's re-marriage. This new departure showed the measure of a Judge's competence to apply the statutory law to a more humane treatment of matrimonial troubles, and to the consideration of larger interests than the limitation of relief to innocent parties with clean hands.

The President's judgement in *Wilson v. Wilson* (*supra*) gave cause for the expectation of a larger exercise of the discretion. Such expectation has not altogether been disappointed. In *Apted v. Apted and Bliss*,<sup>1</sup> the Attorney-General quoted figures showing that, in the long period from 1857 to 1919, out of 109 discretion cases, discretion was exercised (i.e. judgement was given for the petitioner) in about half the number; whereas from 1920 to 1929 there were no less than 690 cases in which the discretion was exercised (in favour of the petitioner), and there might be more, not then available, from a large number of Poor Persons' cases which were heard on Circuit by King's Bench Judges. But there can be no doubt that the discretion had been exercised much more extensively than before in favour of petitioners who had been guilty of adultery themselves, with the effect of terminating marriages which offered no likelihood of reunion and of regularizing illicit unions.

The case of *Apted v. Apted and Bliss* (*supra*) was seen at the time to be important both on account of the long and learned judgement of the President, Lord Merrivale, and in view of the new rule which followed. The judgement suggested to many minds a reaction to those earlier precedents upon which ten years earlier<sup>2</sup> the President had himself considerably enlarged. It is true that, in addition to the proved misconduct of the respondent, the petitioner was also guilty, and the circumstances were aggravated by the illicit cohabitation of both parties for several years and by the failure of the petitioner to state all the facts of his guilt. But the effect of the judgement was to perpetuate the form of a marriage which had failed in fact, and to commit four lives to further sexual irregularity.

When we write of 'four lives' being condemned to further sexual irregularity, we are well aware that the co-respondent was

<sup>1</sup> [1930] P. 246; 46 T.L.R. 456, at p. 458.

<sup>2</sup> *Wilson v. Wilson* (*supra*).

described as a married man. The petitioner was intending to marry the woman with whom he had been living, but the respondent, even if divorced, would not have been able to marry the co-respondent. A decree of dissolution of her marriage would, however, have been the first step; and then she would be free to re-marry, although the possibility of the subsequent divorce of the co-respondent by his wife on the ground of his adultery is matter of speculation. But at least so far as his re-marriage with the respondent is concerned this would not be possible unless the decree of dissolution had first been obtained in the case of *Apted v. Apted*. In the previous history of the marriage, which took place in 1902, two children were born, in 1906 and 1911 respectively. The husband went to the War, and afterwards confessed to a single act of adultery in 1917. But correspondence which passed between himself and his wife earlier in that year suggested that their relations were at least unstable. In 1919 the wife obtained an order for restitution of conjugal rights (which until the Act of 1923<sup>1</sup> was a necessary procedure by which to prove desertion, unless the desertion had already run for the statutory period), and in 1920, in an undefended suit, she was granted a decree *nisi*. But on the King's Proctor showing cause on the ground that the wife had not disclosed her own adultery, the decree *nisi* was rescinded. From that time until the suit in 1930 she appears to have continued to live with the same man. The case for the petitioner stated that he knew nothing of his wife's proceedings in 1919 until the suit came on; but that then, supposing that the wife would obtain a decree, he began to live with the woman now named in his own suit with the intention of marrying her. This cohabitation had continued ever since, and the petitioner had been faithful to this woman; otherwise the isolated act of adultery in 1917 was the only misconduct admitted.

The errors of the petitioner were therefore to be found in his misconduct with the woman with whom he had cohabited through many years, and his failure to make a full disclosure of his guilt; so that, when he had admitted the misconduct of 1917, the Court was not convinced that that was all, and when cross-examined, the petitioner admitted more in earlier days.

But as we have seen, the refusal of the decree left the parties

<sup>1</sup> Matrimonial Causes Act, 1923 (13 & 14 Geo. V, c. 19).

as they were. The lack of candour on the part of the petitioner was inexcusable, and led to the President's new Directions for disclosure, which we shall consider. This lack of candour was emphasized by the Attorney-General,<sup>1</sup> who at the same time noted that since 1919 the petitioner and the respondent had both confined their adultery to one person in each case, and that it was undesirable that such irregular unions should continue. There, it may be said, the Attorney-General touched the crucial point. What can be done to prevent or to regularize such irregular unions? There is no authority, ecclesiastical or civil, which can now compel married persons to cohabit; and even if separation is not mutually desired, an order for restitution of conjugal rights has had no force of actual restitution since 1884. The circumstances of *Apted v. Apted and Bliss* strongly suggested the unlikelihood of the reunion of the husband and wife, and clearly showed the intention of the husband to marry the woman with whom he was cohabiting. But the refusal of a decree meant that none of the parties who were then engaged in illicit cohabitation were or would be free to marry.

It is not suggested that the President's judgement was not perfectly legal and proper under the Act. But on the larger count of interpretation of the Statute it would have been competent to exercise the discretion otherwise. For as we have seen, the President himself, in a previous case, gave judgement in a manner which inaugurated a much more liberal view of the discretion than had been customary for over fifty years.

In *Apted v. Apted* the President did not use the discretion to the end of regularizing the irregular union, and he gave the reasons for his decision in the course of a long and learned judgement. Therein, after a review of cases, he laid down the following principles which should govern the exercise of the discretion:<sup>2</sup>

'In every exercise of discretion the interest of the community at large in maintaining the sanctions of honest matrimony is a governing consideration; a strong affirmative case is necessary before a Judge is justified under the statutes in negating their conditional prohibitions; it is manifestly contrary to law that a judicial discretion in favour of a litigant guilty of misconduct in the matters in question should be exercised when that course will encourage immorality. If it is not unlikely to do so, that is an argument against leniency.'

<sup>1</sup> 46 T.L.R. p. 459.

<sup>2</sup> [1930] P., at p. 259.

When in contrast with this statement of principles we recall those upon which the same President gave a decree in favour of a guilty petitioner in 1920, we must note that two of the principles established in the earlier case were plainly applicable in the case of *Apted v. Apted*, viz., the probability that the refusal of the decree would not reunite the guilty husband and the guilty wife, and the possibility of the guilty husband petitioner's marriage. The Law provided for the correction of one of the irregular unions by divorce and re-marriage; but the Law's provision was not employed.

Thus the judgement in *Apted v. Apted*, dismissing the petition, has been represented not unfairly as reactionary. It is true that the present respondent had once obtained a decree *nisi* against the petitioner in 1919, after a petition for restitution of conjugal rights (such as was necessary before the Matrimonial Causes Act of 1923) and the decree *nisi* had been rescinded, the King's Proctor showing cause. It is also true that, as in the earlier case, so in that brought by the petitioner in 1929, the facts were not fully disclosed. All these counts justified the refusal of relief under the discretionary clauses of the Act and under the Rules of Court. But on the larger count the perpetuation of the existing irregularity cannot be said to serve the cause of good morals.

But further than that, the President laid down a new rule that petitioners who desire the exercise of discretion (as it has come to be understood) must not only state their desire in the petition, as was usual, but must also state in application for the Registrar's Certificate the circumstances in respect of which the discretion is desired and asked for. The effect was to elaborate considerably the rules which had been in practice since 1926, the development of which we ought briefly to note. In the case of *Tickner v. Tickner* (*supra*) the King's Proctor recommended the introduction of the rule that a statement whether or not the Court would be asked to exercise its discretion should be made by petitioners. A direction of May 14, 1926, given by the President, required a scrutiny of all the facts. By a further direction of July 13, 1928, all discretion cases proceeding in the Divorce Registry in London were to be placed upon the defended list and would be heard in London. In *Stuart v. Stuart and Holden*<sup>1</sup> the Judge (Hill, J.) refused a decree on account of the petitioner's

<sup>1</sup> [1930] P. 77.



adultery, which was undisclosed and denied by him; and the Judge enunciated once more the principle that a full and frank disclosure by guilty petitioners was essential to their relief. These rules have now been amended by the President's Directions, following *Apted v. Apted*, of which we are now to take account.

The new rule embodies the Directions of May 29 and 30, 1930, of which the following are a summary:<sup>1</sup>

*' . . . When it is intended to ask at the hearing of a matrimonial suit that the discretion of the Court be exercised on behalf of either party, the petition or answer shall contain a prayer to this effect.'*

Details need not be given here unless the petitioner admits the offence as part of an allegation of condonation, conduct conducive, or other substantive plea. Ordinarily, the following clause in the prayer is sufficient: 'that the Court will be pleased to exercise its discretion in (the petitioner's) favour, and that the marriage be dissolved.'

*'It must also be stated in every application for the Registrar's Certificate whether or not the Court will be asked to exercise its discretion on behalf of either party.'*

Whereas the old form (No. 65) of application for the Registrar's Certificate contained the following short clause referring to discretion: 'The Court will be asked to exercise its discretion in favour of the petitioner' (to be deleted when not applicable); the new form bearing the same number gives the following instruction:

*'If the Court will be asked to exercise its discretion, a statement, signed by the Party, or his, or her, solicitors, setting forth all the facts which require the discretion to be exercised, and the grounds upon which such discretion is prayed, must be lodged with the application.'*

The above new instruction reproduces the conclusion of the President's Direction of May 29th. Full particulars of the offence committed, and, where possible, names, dates and places, should be included. Extenuating circumstances should be pleaded, and if the applicant intends to marry the person with whom the offence was committed (subject to the granting of a decree), this intention should be stated. The statement is for the information of the Court, and forms no part of the pleadings.

A year of practice has shown that this new rule has been of value both to the Court and to guilty petitioners. At first the Direction, requiring not only a prayer for the exercise of the discretion but a full statement of the facts and circumstances of the petitioner's guilt, aroused a fear lest an additional inquisition would militate more than ever against relief. But in practice it

<sup>1</sup> The quotations in italics are from the President's Direction of May 29th.

has been found that where the information has been given in Discretion cases, it has not restricted the exercise of the discretion; and in the present state of the law the information has on the whole facilitated the administration of justice in such cases.

A further and interesting point has arisen in consequence of the Directions requiring full disclosure of the petitioner's guilt as the condition of relief. The Direction of the President to this effect was intended to confine the confession of guilty petitioners to the Court and the King's Proctor. For, unlike the bare admission in the petition, and the prayer for relief which follows, the detailed disclosure of the petitioner (or of the respondent in a case of cross-petition) in application for the Registrar's Certificate forms no part of the pleadings, and is not conveyed to the other party. Sometimes it has happened in recent practice that the respondent has heard of the petitioner's guilt for the first time through the disclosure in the petition. Of course, if the respondent had been hitherto in complete ignorance of the petitioner's guilt, and decided to use the information then disclosed in order to bring a counter-plea of conduct conducing or a cross-prayer for dissolution, there would be no detailed evidence on which to found the plea or the prayer, and the incidental discovery would render the action of the respondent obviously opportunist. But if, as is likely to be the case, the respondent had had suspicions of the petitioner's guilt, the addition of the petitioner's bare confession might then serve to render this answer admissible. The respondent's counter-plea of conduct conducing might then raise the discretionary bar; or a cross-prayer for dissolution might prove successful.

But the objection may persist that the evidence actually needed by the respondent is contained in the petitioner's disclosure in application for the Registrar's Certificate. The question thus arises whether or not the respondent can claim access to the petitioner's full disclosure. The President, in giving the new Direction, intended this confession of the petitioner for the information of the Court and the King's Proctor alone. The document is, therefore, privileged, and would thus appear not to be not accessible to the respondent without the permission of the petitioner.<sup>1</sup> Is it possible, therefore, that this rule, which has

<sup>1</sup> The new (11th) edition of Browne and Latey's *Divorce* is non-committal on this point of privilege (p. 296): 'It remains to be seen if in such circumstances

worked well in practice for the benefit of guilty petitioners, may be found to operate as an unintended connivance at injustice to respondents?

The objection would not apply in a reformed system which provided for petitions on the grounds of incompatibility and mutual consent, and therefore does not apply to-day to those suits which are the result of mutual agreement or undetected collusion, and which in theory the law does not countenance. The objection, if it be an objection, would arise only in suits which are brought actually on the true ground which the law assumes, i.e. antagonistic, or 'straightforward,' suits, wherein the petitioner is actually offended by the respondent's guilt. In such a case, it may be argued, the petitioner cannot rightly complain of the respondent's misconduct, if he, the petitioner, is also guilty of the same offence. The Canon Law doctrine of clean hands seems here morally to apply. And therefore the present procedure of the Court would need no reform in the interests of petitioners who, if other facilities for dissolution were open to them, still chose to base their petition on the ground of adultery. In that case a guilty petitioner would have no genuine grievance if his suit were barred on the ground of his own guilt, or if a respondent's counter-prayer for dissolution were successful.

It is in suits corresponding to the above example in the unreformed system of to-day that the objection may arise that a petitioner, who is guilty, may, as it were, steal a march on a respondent through his skill in concealing his guilt. While this is always possible, the newly required full and frank disclosure (the privilege of the Court and the King's Proctor alone) may be found to facilitate it. Of course, a respondent who knows nothing of the petitioner's guilt cannot found a case on it; he cannot prefer a plea of conduct conducing when the conduct has not conduced. Yet it must be agreed in abstract justice that if the petitioner has been guilty of adultery, the respondent is entitled to enter a cross-prayer for dissolution on that ground, and is barred from so doing only by lack of knowledge; and if the petitioner's adultery had been earlier than the alleged offence of the respondent, and the respondent had known of it, he or she

the other spouse can compel the discovery of the statement of particulars lodged in the Registry either before or during the trial, or such discovery can be refused on the ground of privilege.'

could have filed a petition first. Thus it may happen in antagonistic suits that the new rule will aid petitioners who are clever enough to conceal their guilt from all save the privileged recipients of their official confidences.

In abstract justice, therefore, an objection may lie against the new rule. But it is probable that in practice the injustice also will be found to be abstract; because (1) the genuinely antagonistic suit is exceptional, and therefore the privileged disclosure will not generally be to the detriment of the respondent; and (2) where the suit is defended, a respondent, who learns of the petitioner's guilt for the first time on seeing the petition and prayer, will for the most part have had suspicions which will now fall into their places as evidence. It is probable that, in the conditions in which all the exasperations which promote divorce must be squeezed within the technical ground of adultery, the new rule provides the greatest common measure of working justice. Yet every expedient in present conditions only shows the need for more radical reform.

Thus, while the President's Direction, following his judgement in *Apted v. Apted* (*supra*), must be held to be justified both by his own experience and by succeeding practice, it must yet stand or fall with the law which it was intended to serve. And then it must be maintained that the law has failed to keep pace with the growing understanding of matrimonial causes. The full and frank disclosure of the petitioner's guilt is, in fact, rudimentary evidence of incompatibility. Only in an otherwise 'straightforward' suit—i.e. one in which the petitioner was affronted by the offence of the respondent and the suit being antagonistic, not collusive—would the respondent wish to make use of it to support either a cross-petition on the ground of the petitioner's adultery, or a counter-charge of conduct conducing. *Apted v. Apted* was not such a case. Here both parties clearly desired the divorce. It is true that the President found the petitioner guilty of contempt of Court on the ground of his failure to disclose his previous guilt;<sup>1</sup> but, beyond that, the refusal to grant a decree of dissolution in a case where both parties were guilty, and the petitioner was prepared to marry his cohabiting partner, seems to involve a

<sup>1</sup> The petitioner professed not to have realized that any confession of earlier guilt than his admitted illicit cohabitation with the woman whom he wished to marry was required.

rejection of the President's own progressive judgement in *Wilson v. Wilson* (*supra*).

In the present conditions in which the grounds of every divorce must be pinched within the definition of adultery, the contention that relief will encourage immorality is to repudiate the desirability of re-marriage which was established as a principle in the case of ten years earlier. At a time when, for lack of reform by the Legislature, there is a tendency to more humane interpretation in practice, e.g. to allow (1) habitual drunkenness to rank as 'constructive' cruelty, and (2) certain refusals of conjugal rights to count as 'constructive' impotence, the new precedent of refusal of a decree presents itself as a measure of rigidity and retrogression. In the light, however, of the President's new rule, a petitioner's failure to disclose the full measure of guilt has become inexcusable; and the refusal of relief in such a case as *Couzens v. Couzens* (*the King's Proctor showing cause*)<sup>1</sup> is not only a legitimate interpretation of the Statute, but a just judgement on a petitioner who had deliberately withheld the full facts of her guilt.

This discussion of the exercise of discretion under the Act raises a question of interpretation which strikes at the root of the practice of the Court in all Discretion Cases since 1857. Although the alternative, and we shall contend the true, interpretation of the Discretion would affect relief under the present law, and would have led to very different decisions at least until 1920, this will more fitly be discussed at a later stage.<sup>2</sup>

#### (v) THE KING'S PROCTOR

Although the King's Proctor, whose appointment was recorded in its appropriate historical place in *The New Legislation in England*, cannot as an official strictly be described as a Bar, his office and function are properly to be considered in this chapter. For it is to the discovery and the production of facts material to the issue in any case, and especially of the absolute bar of collusion, that his duty is directed. Once grant the antagonism between litigants, and the Canon Law principle that petitioners must come to the Court with clean hands, then the existence of an official to ensure these conditions is a clear corollary. Much has been written and expressed to discredit the activities and methods of this official,

<sup>1</sup> (1931), *The Times*, June 26th.

<sup>2</sup> Book III, Section I, Chapter IV.

but although his office was adapted to his present purpose, and his duties defined by statute, his function is all one with the system of the inherited law. If a petitioner's adultery is a possible bar to the relief which he seeks in a decree of dissolution, then the Court ought to be informed of such offence and furnished with the facts. An offence between the decrees *nisi* and absolute is an offence during the marriage, and the Court's duty under statute is to consider whether or not such offence is a bar to a final decree. The services of the King's Proctor, in 'showing cause' why the decree should not be granted, and in providing the Court with the requisite evidence, are not the condemnation of his office. For, granted the legacy of the Canon Law principles in the administration of the Statute Law, the office of King's Proctor becomes appropriate. He is a necessary official who goes far to ensure the administration of justice as the law now stands. If he did not provide evidence of the absolute bars against a petitioner's decree, he would be neglecting his duty. If he exercised discretion to conceal a discretionary bar, he would usurp the functions of the Court. The methods of espionage commonly attributed to this official are unpleasant, and the evidence of practice seems to show that they militate more against poor petitioners than rich ones. This does not mean only petitioners in Poor Persons' Causes under the new rules, but other persons who are not poor enough to qualify *in forma pauperis* yet insufficiently affluent to escape detection by travelling. Of course the King's Proctor has been known to pursue a petitioner to the South of France—not in person, but *per alios*—and so to add considerably to costs; but this course is less likely than the exercise of vigilance over persons of generally fixed residence; and the poorest persons, who are the least amenable to instruction and the least instructed, are the most easily caught. The point here is not that these poor people should necessarily be allowed to escape, but that the King's Proctor is commonly incapable of catching the rich. At the same time it must be admitted that the activities of the King's Proctor have prevented frauds and impositions on the Court, which might not otherwise have been detected. In the absence of a root and branch reform of the Law, which would render his present functions irrelevant or superfluous, it is probable that there will always be some suits in which the cause of justice will benefit by his services.

## (vi) SEPARATIONS AS BARS

It will be appropriate to consider the question how far a separation of any kind may operate as a bar to a dissolution, for it has sometimes been represented that even a Separation Order barred a suit for divorce, and indeed this was for a long time the true statement of an indirect effect. From a list of examples designed to show the evil of separations, and published in Appendix XXVI to the Royal Commission's Report in 1912, some have been cited in a pamphlet published by the Marriage Law Reform League,<sup>1</sup> and might be read to suggest that a separation barred an applicant from proceeding to divorce. One case was that of a husband who had been deserted by his wife, and had obtained a separation order. The divorce which he desired in order to marry again would, of course, be barred by absence of proof of adultery; but it would not be barred by the separation order even if the order contained the non-cohabitation clause and thereby terminated the desertion. Even if the order did not contain the non-cohabitation clause and the desertion continued to run, the husband's relief would still be barred by the inability to prove the wife's adultery, and possibly also at that time, even if adultery could be proved, by considerations of cost which the new rules for Poor Persons have considerably ameliorated. In any event he could not have obtained a dissolution on the ground of desertion even if there had been no order, because the law provides at most for a judicial separation on that ground, and then only where the desertion is without cause and for at least two years. While the Summary Jurisdiction (Separation and Maintenance) Acts, 1895-1925, remain unrepealed and unamended, an order containing a non-cohabitation clause will always act as a bar to relief on the ground of desertion, unless the desertion has already run for two years.<sup>2</sup> But that is plainly not a bar to dissolution, because desertion was not then, and is not now, a ground for dissolution.

Two examples were cited of the desertion of wives by husbands who were stated to have lived with other women. The wives both obtained separation orders, in one case for the purpose of gaining custody of her child. The grievance was expressed in the

<sup>1</sup> *Urgent Reasons for Marriage Law Reform*, pp. 12, 13.

<sup>2</sup> *Churner v. Churner* (1912), 106 L.T. 769.

statement that the separation barred the divorce. This might suggest that separations are a device of an evilly disposed legislature to trick poor people into lives of unnatural celibacy, with illicit vice as the alternative. If that were the case, the argument for reform of the law would be more direct and more simply stated than it is now. These examples came from the period before the Commission sat. At that time under the Act of 1857 a wife could obtain a divorce only by proving adultery together with either cruelty or desertion. The separation orders in these cases were obtained on the ground of desertion. If they contained non-cohabitation clauses, these *ipso facto* would terminate the desertion; and, as in *Dodd v. Dodd*<sup>1</sup> proved adultery would not then avail to give more than a judicial separation. Since the Act of 1923,<sup>2</sup> however, the fact that desertion is ruled out by the non-cohabitation clause would not act as a bar to relief, if the adultery could be proved. Under the terms of the Act of 1895<sup>3</sup> a separation order containing a non-cohabitation clause has while in force the effect of a decree of judicial separation on the ground of cruelty, but such a decree is not only no bar to subsequent proceedings, but is proof of cruelty for purposes of such proceedings,<sup>4</sup> although it acts by way of an estoppel between the parties against repetition of the charge of cruelty.<sup>5</sup> This answers any suggestion that a separation order is itself a bar to a petition for dissolution, although it remains the case that if the order containing the non-cohabitation clause is given on the ground of desertion, the Court is not bound to accept the order as evidence of the Matrimonial offence of cruelty or of the Matrimonial offence of desertion (i.e. desertion for the requisite period of two years).<sup>6</sup> If proof of desertion is requisite, and the Order contains the non-cohabitation clause, the proper procedure is to apply to the Court of Issue for the deletion of the clause from the Order. The desertion will then begin to run.<sup>7</sup>

If, however, the Order did not contain the non-cohabitation

<sup>1</sup> [1906] P. 189.

<sup>2</sup> 13 & 14 Geo. V, c. 19.

<sup>3</sup> 58 & 59 Vict. c. 39, s. 5 (a); see also 2 Ed. VII, c. 28, s. 5 (2) (a).

<sup>4</sup> *Bland v. Bland* (1866), L.R. 1 P. & D. 237.

<sup>5</sup> *Harriman v. Harriman*, [1909] P. 133, 134.

<sup>6</sup> *Harriman v. Harriman* (*supra*) per Fletcher Moulton, L.J., at p. 143.

<sup>7</sup> *Boulton v. Boulton*, [1922] P. 229. Here the lack of proof of cruelty or desertion would be a bar to a suit for dissolution in the case of a wife petitioning on the ground of her husband's adultery before July 18, 1923.



clause, it could not have the force of a decree of judicial separation; nor would it furnish valid ground for either a judicial separation or (coupled with adultery) for dissolution, unless the desertion were proved to have been without cause and for at least two years.

The permanence of the effect of judicial separation contains the element of a bar to dissolution. But, although the effect is permanent in that the decree does not require renewal in the fashion of a separation order, the parties are free to renew cohabitation just as divorced persons are—a rare sequel—and on conditions to engage in subsequent proceedings for dissolution. A decree of judicial separation obtained by a wife on the ground of her husband's cruelty is not an absolute bar to a suit for dissolution by the husband on the ground of her adultery,<sup>1</sup> although it may furnish a bar at the Court's discretion. But otherwise its permanence is at the will of the petitioner, who may have the opportunity to set the other party free, but may not take it. A successful petitioner for a decree of judicial separation may petition for dissolution on the ground of a further offence, irrespective of whether such offence took place before or since the former suit.<sup>2</sup> That is to say, that, if the decree of judicial separation were given on the grounds of cruelty or desertion, the petitioner may proceed to petition for dissolution on the ground of adultery, whether that adultery took place before or after the suit for judicial separation. But if the decree of judicial separation were given on the ground of adultery, the petition for dissolution must not be founded on the same act of adultery, but may be founded on some further similar offence. The objection against the present law is overstated if it suggests that even a judicial separation is an absolute bar to a dissolution. But the objection is strong that the law allows a decree of judicial separation to take permanent effect in the absence of conditions which are particularly favourable to the respondent. If the respondent has adequate evidence against the petitioner, a cross-petition may secure a dissolution, subject always to the discretionary bar set up by the guilt of the respondent (who cross-petitions). Or if the petitioner has both the opportunity and the desire to proceed

<sup>1</sup> *Yeatman v. Yeatman and Rummell* (1870), 21 L.T. 733.

<sup>2</sup> *Green v. Green* (1873), L.R. 3, P. & D. 121; *Mason v. Mason* (1883), 8 P.D. 21, C.A.; *Fullerton v. Fullerton* (1922), 39 T.L.R. 46.

further, the judicial separation may be followed by dissolution. But while the petitioner's choice of judicial separation, and not of dissolution, on the ground of adultery probably means a desire not to set the other party free, a petition on the ground of cruelty or desertion does not necessarily imply that the petitioner would not proceed further if there were subsequent evidence of the respondent's adultery. But this would mean that a respondent who was guilty of both cruelty (or desertion) and adultery would be more favourably placed than if the offence were limited to cruelty or desertion. The old objection which lay before the Matrimonial Causes Act of 1923 in the matter of a wife's petition for dissolution, viz., that the more offences a husband committed the better his chances of freedom, may still apply where a suit for dissolution follows a judicial separation on the part of the same petitioner.

It will thus be seen that while the conditions which governed a wife's petition for dissolution before the Act of 1923 did allow a separation order on the ground of desertion, if it contained a non-cohabitation clause, to bar a suit for dissolution, that Act removed this disability; and, further, the new rules for Poor Persons' Causes have facilitated divorce proceedings which would have been barred by considerations of cost. While, however, it cannot rightly be maintained that a separation bars the person against whom it is given from petitioning for dissolution where proof of adultery is available, it may yet have that effect, because, although the separation is not an absolute bar, the ground of the separation may furnish a bar at the discretion of the Court. The bar, then, is not strictly the separation order or the judicial separation, but the offence which caused the separation and of which the separation is the evidence. Again, it is not strictly true to say that permanent separation bars divorce when a petitioner has the requisite evidence; but the separation may increase the difficulty of obtaining the requisite proof, and, in the case of a respondent who is guilty of adultery, a petitioner, by limiting the petition to judicial separation, may thus bar the respondent from freedom and re-marriage. The separation itself does not bar the divorce, but facilitates the operation of existing bars and disabilities; and in present conditions a separation order, given in a Court of Summary Jurisdiction, may have the disabling effect of a permanent separation.

## CHAPTER IV

### BARS TO SEPARATION

The same initial bars of course apply to suits for judicial separation as to suits for dissolution. But while the Court must have jurisdiction and the alleged offence must be proved, the treatment of petitions for separation has been less stringent than in the case of dissolution. In this the Court has followed the precedent of the Ecclesiastical Courts. Thus domicile is not necessary, save as an alternative, to give jurisdiction in suits for judicial separation; for, as established in *Armytage v. Armytage*,<sup>1</sup> it is sufficient that both parties, whatever their domicile or nationality, are resident in England at the time of the institution of the suit, even if the alleged offence, in that case cruelty, had been committed abroad. If the respondent is not resident at the time of the institution of the suit, then the parties must be domiciled in England. But if the parties are neither resident at the time of the institution of the suit nor domiciled in England, the Court has no jurisdiction. The absolute and discretionary bars apply to suits for judicial separation, but, following the old ecclesiastical practice, the Court has shown a tendency to take less account of discretionary bars in suits for judicial separation than in suits for dissolution. It is a legacy of the Canon Law that the anomalous state of separation, while the parties remain married, is easier to obtain than a dissolution which carries the right to marry again. Cruelty or desertion by a petitioner is not a bar to a decree of judicial separation petitioned on the greater ground of adultery,<sup>2</sup> although either may become a bar if the cruelty or desertion of the petitioner is shown to have conduced to the adultery of the respondent.<sup>3</sup>

When considering the alleged effect of separation as a bar to dissolution, we noted the disqualifying effect of the non-cohabitation clause when inserted or retained in an order given on the ground of desertion. For, although such an order does not

<sup>1</sup> [1898] P. 178.

<sup>2</sup> *Moorson v. Moorson* (1792), 3 Hag. Ecc. 87, 92, etc.; *Evans v. Evans* (1790), 1 Hag. Ecc. 35, 120, etc.

<sup>3</sup> *Hodgson v. Hodgson & Turner*, [1905] P. 233.

in fact bar a suit for dissolution except in the case of a wife's suit on the ground of her husband's adultery before July 18th, 1923, the adultery being coupled with desertion; it would bar a suit for judicial separation on the ground of desertion, unless the desertion had already run for two years and was without cause, because the order containing the clause terminates the desertion.

But it would appear that since the application for an order on the ground of desertion need not be made within six months from the date of the desertion (i.e. not necessarily the date on which cohabitation ceased, but the date from which the intention to desert became evident), there is no reason why it should be made within the period of two years, which is requisite for a petition for judicial separation. Although, then, an order containing a non-cohabitation clause would put an end to the desertion, it would not necessarily bar the applicant from petitioning for a judicial separation on the same ground. But on such a petition relief would be barred if the order were given within two years of the date of the desertion.<sup>1</sup> The legal value of a judicial separation is that it is permanent, whereas an order containing a non-cohabitation clause has the effect of a judicial separation on the ground of cruelty only while in force; and for subsequent proceedings such an order will not necessarily be taken as sufficient evidence either of the requisite desertion or of cruelty, unless the clause had been inserted on that ground.

<sup>1</sup> *Harriman v. Harriman*, [1909] P. 123, C.A. approving *Dodd v. Dodd*, [1906] P. 189.



*BOOK III*

A PLEA FOR REFORM



## SECTION I

### THE INDICTMENT

#### *GENERAL CHARGE: THE FAILURE OF THE ECCLESIASTICAL CONCEPTION OF MARRIAGE AND THE ANCILLARY LEGAL SYSTEM*

## CHAPTER I

### INDISSOLUBILITY AND THE CHALLENGE OF LIFE

Investigation into the law of marriage and divorce may well seem to leave out of count much that marriage means in the lives of many. The sad and sordid records of the Divorce Court do not touch the ideal marriage, or fairly reflect except by contrast what the ideal marriage ought to be. Yet the Divorce Court with its long record of broken marriages and of marriages worse than broken—when, after all the exasperations of a suit, the Court refuses to give a decree of dissolution and the parties remain married—does not tell the whole tale of matrimonial misery. Many marriages, although far from being ideal, never reach the publicity of the Court, but remain closed books of disappointment and sorrowing endurance. Those who are happily married, and those who at least are moderately content with their marriages, are disinclined to be greatly concerned by the matrimonial failures which surround them. But sometimes some case of their own friends is brought sharply to their notice, or for some special reason the subject appeals to them as a humane cause, in the category of the prevention of cruelty to animals, or the League of Nations. It is far from being a reflection on the great causes of kindness to our friends the lower animals and of the preservation of the peace of the world if we say that the happiness of married life is even more far-reaching in range of effect. So many of the manifold evils of human existence follow from private unhappiness and discontent that it might be said that happiness at home is a positive source of kindness and peace



in life at large. To the making of a successful marriage there is needed both the possession and the expression of love, a quality which covers the co-existence, in some degree, of at least these ingredients: the mutual devotion and mutual appreciation of two persons, together with the companionship of common interests and united purpose, varied by those individual interests the pursuit of which preserves the strain of individual personality, and consolidated by temperamental and sexual compatibility. The happy marriage cannot always be achieved in the first venture. The ideal marriage may sometimes be the second attempt after the failure of the first. In spite of all that can be charged against our Divorce Law, on the ground of its failure to do justice, and against the Divorce Court on the inevitable but unjust ground that its revelations are shocking to sensitive minds, the truth remains incontestable that their *raison d'être* is the promotion of the ideal marriage. It is all too easy for churchmen, who are not in close touch with the Courts, to ignore this aspect of the law in Matrimonial Causes. But it is also easy for lawyers of either branch of the Profession, who practise in the Divorce Division, to grow cynical over the sorry tragedies which occupy them; therefore it is of no small credit to them that expressions of the need of reform of the Law in Matrimonial Causes in the interests of justice and humanity should largely come from lawyers.

The reform of the law requires understanding of its operation; but, as we noted at the outset of our enquiries, no reform will be carried into fruitful effect unless there is a sufficient volume of opinion in the country to move the Legislature to action. The opinion which will command attention will not only express discontent with the inherited principles of the law and the consequent injustices which the Court, with the best will in the world, cannot avoid, but will found its case upon its conception of the nature of marriage. Hitherto, as we have seen, English opinion and English law have been based upon the doctrine of the indissolubility of marriage which the Canon Lawyers devised directly from the isolated *dicta* of the Gospels. This had not been the previous and consistent rule even of the Christian Church, and it was not the law of England until William the Conqueror brought the Canon Law from abroad and replaced the elements of the old liberal indigenous Anglo-Saxon law by the new tyrannical system of the Roman Catholick Church. In

these days English opinion has changed and is changing. Although the principles and procedure of the Canon Law have remained to guide the Divorce Court under the new legislation, there has appeared a growing dissatisfaction with that legacy. The Divorce Court has inherited too much of the atmosphere of a Court of criminal jurisdiction, wherein relief is set against the element of punishment; and by a system of bars, which have been set out in Book II, and will receive more detailed enquiry in this Book, relief which is due on a statutory ground is refused to a petitioner who has played for it, and may be refused when both parties have qualified for it. For the worst forms of matrimonial collapse, cruelty and desertion, which show unequivocally that a marriage is a failure in fact and has been terminated in intention, the law offers only a permanent separation. In such matrimonial impossibilities as lifelong lunacy, incorrigible drunkenness, and imprisonment for life, the law gives no hope to the other party save celibacy or a life of unconventional and illicit intercourse. Such is the effect of the Canon Law doctrine of indissolubility of marriage, and the inherited tradition of punishment for every attempt at its evasion.

Does the modern world hold this doctrine of indissolubility? Does indeed the Church? It is notable that the Bill in 1923<sup>1</sup> enabling wives to petition for divorce on the ground of adultery alone received in the House of Lords the support of the Archbishop of Canterbury and the Bishop of London. Such is the effect of the literal translation of the excepting clause in Matthew into modern life, that contrary to all reason the doctrine of indissolubility becomes patient of extended dissolution on that one ground. But is this doctrine consistent with the true conception of marriage? And is this doctrine consistent with an exception which allows dissolution for what may be an accidental and isolated offence, while serious symptoms of complete matrimonial breakdown admit of no such relief?

The religious mind, in a genuine endeavour to preserve the sanctity of marriage, confounds causes with symptoms, condemns the symptoms and ignores the causes. It decries the 'sin' which must perforce be exhibited in the Court as evidence, forgetting that the 'sin' is but the symptom of radical disease. If a spouse is happily married, it is unlikely that he or she will petition for

a dissolution of marriage on the ground of an isolated act of adultery on the part of the other, although that is a valid ground if there should be a desire to make use of it. A petition on that ground commonly signifies that there is some radical discontent from which the offence offers a ground for escape. If, then, adultery is frequently the occasion, but not the true ground, of divorce, why should not other symptoms provide the occasion through which the parties may obtain relief on the radical ground of matrimonial collapse? The radical ground is fundamental disagreement, lack of love, which issues not only and not necessarily in adultery, but in cruelty, desertion, drunkenness and crime. But this ground, except in a few progressive countries, has not been admitted since the Canon Law of the Catholic Church replaced the old Roman Civil Law on the Continent and the old Anglo-Saxon law in England. Ecclesiastically marriage is a sacrament, and of course, in company with all institutions which involve consent and mutual undertaking, marriage presents certain sacramental elements. In writing to the Ephesians St. Paul gave some matrimonial directions on the analogy of the relation between Christ and the Church, from which he drew a sacramental inference.<sup>1</sup> On this analogy the Canon Lawyers worked out their sacramental definition of marriage, and pronounced it to be a sacrament in order to establish papal control over matrimonial causes. Gratian defined marriage as the spiritual union, which first depends on the will of the parties, and then is confirmed by physical consummation. But this definition was not unqualified, for Pothier contended within the Church that the essence of the sacrament consisted in the contract or consent of the parties, which was terminable by dissolution under secular authority. Cardinal Cajetan so far qualified the Pauline analogy as to say that, according to St. Paul, marriage was not a sacrament but a mystery, and the mystery of these words was great.<sup>2</sup> Marriage is indeed a mystery, in the measure that the many-sidedness of love, while intelligible and recognizable, ultimately defies analysis. But to found a theory of marriage on any other basis than the indispensable condition of love is to build on the shifting sands.

The principle of true marriage finds expression precisely in the dominical pronouncement which has been employed to establish the indissolubility of formal marriage: 'What therefore God

<sup>1</sup> Eph. v. 23.

<sup>2</sup> S. B. Kitchin, *History of Divorce*, pp. 63, 64.

hath joined together, let not man put asunder.'<sup>1</sup> This follows the reference to the creation of the sexes, and the union of the sexes in marriage. According to the customary use of the Jewish Scriptures at that time, as we noted in our study of *The Contribution of Christianity*, the Founder quoted Genesis; and as Wellhausen argues, He set Genesis against Deuteronomy. Jesus set Moses against Moses, the law against the law, the fundamental principle against the device of the Deuteronomic Law which provided for a husband to give a writing of divorcement to a wife. Actually the Deuteronomic legislation was in a small measure restrictive of the inherited liberty. But the purport of the teaching of Jesus was to uphold the ideal against all lower levels and laxity of practice.

A true marriage of permanent intention and genuine affection is one of which it may be said that God has joined the parties. But this cannot be said of all marriages. The fact of marriage in Church does not of necessity carry with it this divine authority. For on all sound principles of theology, the Church, through the officiating minister, witnesses to the marriage which the parties contract; provides a valid legal ceremony and invokes the divine blessing upon those who have thus contracted the marriage. It is quite obvious that there are some marriages in which it cannot be said that God has joined the parties. Furthermore, there are other marriages wherein the best intentions and the presence of true affection are not maintained, and the conditions of true union fail. Then the parties clearly cease to be joined by God. The conjunction is a human act witnessed by the Church's ministers or by the official Registrar; but the divine authority is a continuing process dependent upon the marriage remaining true. It cannot be said that the act is irrevocable when the conditions have completely changed, or that, when a marriage declines in deadly hatred, the parties are still joined by God. But if provisions are made for the dissolution of such failing marriages and the renewal of unions in more hopeful association, these plainly require adequate regulations with due safeguards against hasty or ill-considered separation. There is a place for the value of vows, and for the presentation of the case for permanent union against the impulsive influence of passing phases of disagreement. The marriage may be fundamentally

<sup>1</sup> Matt. xix. 6; Mark x. 9.

sound, and the parties will rightly be described as 'those whom God hath joined together'; and in that event the authority of religion may rightly assert itself for the preservation of marriage against all undue facilities for dissolution. The divine law of marriage properly means the due maintenance of true marriage, in contrast with irresponsible marriage; the ideal implied by the Founder of Christianity against the lax and inequitable standards of law and custom which were current in Judaism in His time.

But the conception of marriage as a sacrament, in all conditions indissoluble, does not in fact assure the maintenance of true marriage; nor can it be maintained that the so-called sacrament of marriage makes the married persons what they are not. When Dr. T. A. Lacey enunciates the theory that marriage achieves a natural relationship equivalent to that of father and son, brother and sister, it must be admitted that this is a highly mystical view.<sup>1</sup> For, apart from the divorce practice of civilized countries by which this relationship is sundered, there would seem to be more pertinent examples to qualify the position that marriage is the equivalent of relationship by birth. Even if the question of dissolubility by divorce, the dissolution of a valid marriage, be for the moment set aside, it will be admitted on canonical principle that a decree of nullity pronounces a marriage never to have existed; yet no corresponding decree could pronounce a brother and sister not to be the children of the same parents. If it be answered that, because nullity means that there never was a marriage, therefore the natural relationship had never been established, it must be urged that this denial of the validity of marriage is in some cases somewhat capricious since it depends on the particular legislation of the country of domicile which determines the capacity to marry. Of course, some of the grounds of nullity are constant throughout the countries and Churches of Christendom; but the fact that a diriment impediment in one country is unknown in another may mean that a marriage which is valid in the country of its celebration will be upset by the law of the parties' domicile. In other words, the marriage relationship, whether it be described as sacramental or as identical in essence with the relationships inherent in the natural family, may be found to depend finally not on the consent and intention of the parties,

<sup>1</sup> *Marriage in Church and State*, pp. 17, 18; quoting McFayden.

not on the validity of the marriage formalities, not on the consummation of the marriage, but on the capacity of the parties to marry, which may vary according to the law of domicile; and this in turn depends on the legislative enactments of different countries. This may be an argument against the dominating principle of domicile in the English Law; but it seems to point to the collapse of the theory of the ineradicable relationship created by marriage, when this is found finally to depend on varying laws determining capacity to marry which the English Law must recognize. This argument is pursued in more technical form in a note at the end of this chapter.

The consent of the parties is the true basis of marriage; and subject to legal validity the parties properly marry themselves. Therefore no ecclesiastical ceremony can of itself establish a natural union ordained by nature in such wise that it cannot be sundered; and it may be added that the copula, which the Canon Law established as a condition of complete marriage, is no true substitute for love. Marriage is a natural relationship in the sense that the institution of mating in marriage has been verified from the earliest days of civilization; but divorce equally is so ancient that it cannot be said that marriage has in fact ever been indissoluble. Nor can a legal ceremony unite two persons in more than form. The law can go some way to holding them to one another, as the Canon Law attempted by the device of the restitution of conjugal rights—the coercion of one party into the fulfilment of the contract of cohabitation. But the law which provides due forms of marriage for the regulation of society, the protection of persons and the security of property, has always expressed the conviction of human infirmity, in larger or lesser degree, that persons united in the married state are not necessarily united in a sound, a desirable, or even a safe union, and that matrimonial exasperation must have an outlet. Such exasperation is far from being necessarily expressed in quarrels or malicious cruelty or violent explosions. It may be the fundamental discovery and disappointment that love has come too late into the lives of one of the parties, and has come from outside. There may be a friendly regret within the marriage, but a categorical imperative to follow the imperious lead of love, which at length has been found after the experience of misleading lures. The burden of Horace's *Ode* (I, xxxiii) is a common experience: 'Lycoris loves Cyrus, Cyrus

loves Pholoe, and Pholoe abominates Cyrus. It is the cruel sport of Venus to join together those who will never make a match.' But it is the work of civilization to enable the misled and misallied to realize their destiny in happier unions.

The failure of formal marriage, and the need of free marriage and free divorce as the civilized substitute, had an unrivalled exponent in Milton, whose *Doctrine and Discipline of Divorce* upholds a view which Reformers are only now recovering. He insists that marriage is 'a covenant, the very being whereof consists not in a forced cohabitation, and counterfeit performance of duties, but in unfeigned love and peace';<sup>1</sup> and again, it is 'not a mere carnal coition, but a human society; where that cannot be had there can be no true marriage.'<sup>2</sup> Milton saw, as we see to-day, that marriage, in which the physical connection is the determining legal factor, may be empty of all that goes to make a true union; for sexual intercourse itself is only then complete, when it is the expression of a fundamental union as well of personalities as of bodies. For the conventional marriage, which holds together persons who are ill-yoked in a formal union of incompatibility or even of mutual hatred, he blames the Canon Law which operates 'doubtless by the policy of the devil' in the interests of licentiousness; because it is the absence of reasonable liberty which leads to licence. While Milton was in advance of his Puritan contemporaries in his proposal to remove matrimonial causes from the Courts, he did not explicitly extend to women the freedom which he advocated in general terms. He did not deny their title to the freedom of divorce which he proposed; and indeed his argument proceeds on the assumption that women are the equals and companions of men. But actual equality of the sexes in marriage and divorce was more than his age could have digested. It is the emancipation of women, whom the law in matrimonial causes has depressed in the past, which is the principal factor in the current movement for reform. Women attained equality, independence and full companionship with men under the Roman Empire; but in succeeding ages they have been subordinated by masculine legislation until they have accepted tacitly the masculine assumption that sexual development, which is much larger and further reaching than the incident of physical intercourse, is a male prerogative. The present, how-

<sup>1</sup> Bk. I, chap. 5.

<sup>2</sup> *Ibid.*, chap. 13.

ever, is an age of vast revelation, from which reaction is unlikely, but great reform may come.

Dr. Havelock Ellis gives an example which shows, particularly in the life of women, the supreme importance of the full development of sexual understanding in the life of love for the success of marriage.

'A woman may have been married once, she may have been married twice, she may have had children by both husbands, and yet it may not be until she is past the age of thirty and is united to a third man that she attains the development of erotic personality and all that it involves in the full flowering of her whole nature. Up to then she had to all appearance had all the essential experiences of life. Yet she had remained spiritually virginal, with conventionally prim ideas of life, narrow in her sympathies, with the finest and noblest functions of her soul helpless and bound, at heart unhappy even if not clearly realizing that she was unhappy. Now she has become another person. The new liberated forces from within have not only enabled her to become sensitive to the rich complexities of intimate personal relationship, they have enlarged and harmonized her realization of all relationships. Her new erotic experience has not only stimulated all her energies, but her new knowledge has quickened all her sympathies. She feels, at the same time, more mentally alert, and she finds that she is more alive than before to the influences of nature and of art. Moreover, as others observe, however they may explain it, a new beauty has come into her face, a new radiancy into her expression, a new force into all her activities. Such is the exquisite flowering of love which some of us who may penetrate beneath the surface of life are now and then privileged to see. The sad part of it is that we see it so seldom and then often so late.'

It is irrelevant in this example whether the termination of the first and second marriages was brought about by divorce or by the death of the husbands. Either would be regrettable, yet both would serve equally as the portal through which the woman finds the light of love; and, incidentally, divorce would offer the advantage of another chance to the disappointed husbands.

The movement towards sexual justice and larger grounds of divorce is identified historically with the emancipation of women. After the early attainment of women's high status in Babylon and Egypt, the decline of the old Roman ceremonial or procedure, by which a wife passed *in manum*, automatically gave to wives the rights which they lost when they passed *in manum*. But the position of Roman women declined again under the Canon Law

<sup>1</sup> *Little Essays of Love and Virtue*, pp. 128, 129.



which disallowed divorce. The recovery of the practice of divorce by Parliamentary procedure in England chiefly benefited husbands; and the new Act of 1857 required considerable amendment before justice could be said to be done to wives. The temper of the age was perhaps more anti-feminist than was the new statutory law; but a change in the outlook overtook the law and influenced both the Legislature and the Courts. Under the Canon Law woman has been accounted wicked and wayward, and must be controlled; under the Victorian *régime* woman was idealized as an angel, but assumed to know nothing of affairs and circumscribed by the rules of the nursery. Therefore it accorded with the ideas of the age, which produced the first English statutory legislation in Matrimonial Causes, to incorporate Canon Law principles both to punish women and to indulge them. A woman who committed adultery was so horrible that her estate must be taxed. At the same time, whether she were guilty or her husband, she was incapable of supporting herself and must be maintained at his expense. On every count woman was inferior. The perversions of the Victorian mind have lingered in our legislation, and allow the emancipated women of to-day to trade on the indulgent legacy of the fallen angels. Yet the later 19th century began the revolt, and opened the later familial phase in English life.

Neither Church nor State, even by the invocation of natural relationships, can finally hold two minds, two wills, two hearts in union when affection and agreement have disappeared, and discontent and deadly hatred reign in their stead. The most, or the worst, that either Church or State can do is to hold the parties to a formal union by disallowing dissolution of marriage. And even when dissolution is disallowed, some outlet is always found; and the result is almost always worse than legally regularized divorce and re-marriage at the volition of the individuals concerned.

The law aims at holding married persons in a legal union, even when the conditions of any but formal unity have passed. The one ground upon which as yet opinion has effected a relaxation of the law is the physical ground of the adultery of one of the parties. The opposition to further reform comes mainly from those who professedly exalt the spiritual aspects of life; and yet it resists any relaxations of the rule of indissolubility beyond the present divorce for the physical act of adultery. This ecclesiastical opposition would prefer, of course, to make all marriage indis-

soluble, and so to disallow divorce even on the ground of adultery. But even the Minority Report of the Royal Commission in Matrimonial Causes in 1912 recognized that there could be no such reaction; so that, as we have seen before, ecclesiastical prejudice stands firmly entrenched in the provisions of the Act of 1857, with divorce for adultery but on no other ground. This suggests the interesting point raised by Lord Birkenhead, L.C., in the House of Lords in 1920, that there is a kind of ecclesiastical sanction for divorce on the ground of adultery, which he attributed to an unconscious opportunism:

'I, my Lords, can only express my amazement that men of saintly lives, men of affairs, men whose opinions and experience we accept, should have concentrated upon adultery as the one circumstance which ought to afford relief from the marriage tie. Adultery is a breach of the carnal implications of marriage. Insistence upon the duties of continence and chastity is important. It is vitally important to society. But I have always taken the view that that aspect of marriage was exaggerated, and somewhat crudely exaggerated, in the Marriage Service. I am concerned to-day to make this point, by which I will stand or fall, that the spiritual and moral sides of marriage are incomparably more important than the physical side. . . . I do not think that the Most Reverend Primate the Archbishop of Canterbury, who, I believe, is to follow me in this debate, would for one moment, if dialectically he were a free agent, lend the weight of his authority to the position that the physical side of marriage is the highest. And yet be this observed, that those who oppose this Bill must say that, and for this reason, that if they say that the physical side of marriage is not the highest, they are committed to this monstrous and mediæval paradox that they assent to divorce for a breach of the less important obligations, and they deny divorce for a breach of the more important obligations of marriage. I conceive this to be an insult to the spiritual and sacramental conception of marriage; and it is just because I place other elements in the married state far, far higher than I place the physical relationship that I make this fundamental in my argument.'<sup>1</sup>

Perhaps those who conscientiously oppose any extension of the grounds of divorce are not aware of the amount of collusion—or 'camouflage'—by which petitions for divorce, which is really sought for other and sometimes deeper reasons, are pinched within the definition of adultery. The Minority Report of the Royal Commission in 1912 advanced the following objection to increased facilities for dissolution: 'That marriage should be life-long and indissoluble, and that marriage should be dissoluble on

<sup>1</sup> *Points of View*, Vol. I, p. 214; and *Hansard*, 1920 (Lords), vol. 39, p. 672.

grounds which lend themselves to the easiest collusion and which seem necessarily to involve the right of either partner to put an end to it at will, are contradictory propositions.' Apart from the fact that the recognition of an ideal and the provision of relief for those who fail to realize it are not necessarily contradictory, the weak point in this argument of the Minority lies in the reference to easy collusion. Collusion is common to-day on account of the statutory limitation of relief to one ground; but it is not likely to grow, but rather in the nature of the case to decrease, in consequence of enlarged facilities for relief. The technical definition of collusion is such that collusion exists only when the true ground of matrimonial failure is not a ground provided by the law, and the parties agree to produce evidence of the ground which the law admits.<sup>1</sup> The parties agree to furnish evidence of guilt which is essentially false, because, although the guilt, or the appearance of it, has occurred, it is not the true ground, but only the ground artificially provided to meet the only condition of relief provided by statute. Mutual consent, therefore, is collusive under the present law; but if mutual consent were admitted as a ground for dissolution, it would not be collusive, because in such conditions there would be no agreement to present a false case. If to-day cruelty is the true ground, but evidence of adultery is furnished by agreement, the suit becomes collusive. But if cruelty were admitted as a ground, the chance of such collusion would be reduced. If, then, a larger variety of grounds were admitted, there would be a greater opportunity of obtaining divorces on the true ground; and the number of collusive suits under the present system, which is an ecclesiastical survival, would be likely to enjoy a diminution. The obstructive opponents of Divorce Law Reform have done a disservice to truthfulness, good morals and respect for law.

Since Victorian days, when causes were fought on the direct and genuine issue of adultery, and reputations collapsed under the Court's pronouncement of guilt, the attitude of society has greatly changed. The offence of adultery has become, as it were, a pawn in the game; or rather, since the issues are too serious to admit properly the simile of play, adultery is used as a ground by which to bring to an end a legal marriage which in fact has failed of its promise. When a marriage has broken down through

<sup>1</sup> *Vide* Book II, Section II, Chapter III (ii).

incompatibilities which, even if they are connected with sexual disagreement, have become much larger, then physical unfaithfulness, or sufficient evidence of it, is used in order to secure a dissolution. When folk cannot mend a marriage, they adapt the system in order to end it. The Judges of the Divorce Division and those members of the legal profession who practise in Matrimonial Causes know this; but the ecclesiastical opponents of reform act as though they thought that a system which would enable people to tell the truth is worse than the present fiction.

It would be intelligible that those who hold a purely physical view of marriage should take within their purview only those physical incompatibilities of which adultery might seem to be the evidence; but it is astonishing that those who exalt the spiritual values and responsibilities of marriage, and would closely confine the physical relationship to the deliberate purpose of the procreation of children, should resist all relief to those whose marriage has suffered, not a passing phase of physical unfaithfulness, but a spiritual shipwreck. The opposition to Divorce Law Reform does not consciously intend to encourage adultery, but its effect is to drive those who are the sufferers of spiritual discontent in marriage to adopt the physical 'sin' (or the pretence of it) in order to obtain the only kind of divorce which the ecclesiastical mind will in any wise countenance.

#### *Further Note on the Alleged Analogy between Marriage and the Relationships of the Natural Family*

In the foregoing chapter Dr. Lacey's contention, that marriage establishes a relationship equivalent to that which is established by birth within the family, has been noted and briefly treated. It is suggested that the answer to this contention is to be found in the sphere of annulment of marriage. It may, of course, be put with precision that a decree of nullity proves that the annulled union never was a marriage, and that a valid marriage would not admit of annulment (nor canonically of dissolution unless the marriage were unconsummated—*conjugium ratum sed non consummatum*—a ground unknown to the English Law). But if we may proceed to take a possible case, it may be suggested that a decree of nullity may have an effect which could not be reproduced upon the natural relationships. In accordance with the *lex domicilii* a

marriage may be barred by an *impedimentum dirimens* which is unknown to the *lex loci celebrationis*. Suppose that persons domiciled in one country, but resident in another, contract marriage in the country of residence, and that the marriage carries the true conditions of consent and intention of permanence, and conforms to the *lex loci*. Yet the marriage may be void by the law of domicil.

In *Sottomayer's* case (1877), 3 P.D. 1 C.A. (*vide* Book II, Section II, Chapter II, *supra*), if the husband had been domiciled in Portugal (where the Canon Law determined Matrimonial Causes before the Revolution), the marriage, being of first cousins, would have been void by the *lex domicilii*, although otherwise there was no impediment against it in England, where the marriage took place and where it was valid by the *lex loci*. As a matter of fact the marriage was held to be void by the House of Lords before the discovery that the husband's domicil was English at the time of the marriage, a discovery which was not made until the case had been referred back to the Divorce Division, with particular reference to the question of domicil. Thus the validity or invalidity of the marriage depended on the law of domicil at the time of its celebration. If, then, as it turned out, the husband chanced to be domiciled in England at the time of the marriage, the marriage would not be voided, because the capacity to contract marriage would be determined by reference to the English Law. Here, then, had the husband's domicil been Portuguese, a marriage, perfectly good on all other grounds by the *lex loci*, would have been voided by the *lex domicilii* (which happened in the case of matrimonial causes to be the Canon Law, although the *impedimentum dirimens* was one not of 'divine law,' but capable of papal dispensation).

Dr. Lacey's argument that marriage has the effect of creating a relationship of the same ineradicable kind as that of parents and children, brothers and sisters, would seem to require the exclusion of certain diriment impediments which have canonical authority. For, otherwise, in order to maintain the validity of the impediment against the marriage of first cousins on other ground than the legal (but hardly divine!) principle of domicil, it would be necessary to repudiate the statutory legality of the marriage of first cousins in England, because under the Canon Law such marriages are within the prohibited degrees and require a papal dispensation. If he is not prepared to lodge the canonical bar against such

marriages, then it would seem that a marriage of free consent, contracted with intention of permanence, and valid by the *lex loci*, would constitute a marriage such as to satisfy (on his hypothesis) all the binding sanctions of a natural union which he demands. Yet an *impedimentum dirimens*, under a foreign law of domicil, can render it no marriage. But if, as in *Simonin v. Mallac* (1860), 2 Sw. & Tr. 672, and *Ogden v. Ogden*, [1908] P. 46, the impediment were only *impeditivum* (local or temporary, which could be discharged by procedure or by time, e.g. obtaining parents' consent or awaiting requisite age), the marriage, valid by the *lex loci*, has been seen to hold. If, however, the extension of the domiciliary factor, following *Salvesen's* case ([1927] A.C. 641), should render conclusive an annulment by the court of domicil, not only on the ground of an *impedimentum dirimens*, but even on the ground of one which was *impeditivum*, the validity of marriage would become more than ever at the mercy of the foreign law of domicil.

It is clear that no such fortuitous conditions can eradicate the relationships of the natural family; for, even granted the disqualifications of illegitimacy, an illegitimate brother is a brother of the half-blood, and a bastard remains the child of his mother. In order to maintain a semblance of this solidarity in a marriage which at present may be annulled in accordance with a man-made law of domicil, the protagonist of an indivisible, sacramental union would have to secure a complete uniformity among diriment impediments, or else the exclusion of all interference by the *lex domicilii* with the *lex loci*. Dr. Lacey has to face the fact that of two marriages, both equally valid by the *lex loci*, both marriages of free consent and intention of permanence, and spiritually sound unions, one may be valid by the *lex domicilii*, and the other void. Therefore the question whether the marriage is the equivalent of the ineradicable relationship of blood, or is no marriage at all, will depend on whether a particular impediment is or is not sanctioned or adopted by a particular legislature as the law of a particular country.

Again, if a man marries his deceased wife's sister under the Act (7 Ed. VII, c. 47), these questions must be asked: (1) Would Dr. Lacey hold that the relationship is of equivalent solidity with that of brother and sister? Or (2) would he hold it to be void by canonical impediment of affinity? On his principles he must do one or the other. If the first alternative be adopted, what then was

the cause of the objection to the Act which established the legality of such marriages? If the second alternative be chosen, the effect is that a number of marriages, valid *quoad* consent, intention, civil capacity, and *solemnitates* (and otherwise competent to qualify for Dr. Lacey's conditions of natural union), will incur the official disapproval of the Church on a ground which has no validity except under the Canon Law, and even so is capable of dispensation. It would seem that the argument that husband and wife bear a natural relationship in the nature of that which is admitted in the case of father and son, or brother and sister, has nothing to support it on legal grounds, so far as concerns English Statute Law and Divorce Practice. On Canonical grounds the argument will hold until an arbitrary impediment upsets it—'arbitrary,' because it is of that variety of *impedimentum dirimens*, which is not of 'divine law,' and therefore would admit of dispensation.<sup>1</sup> But the Canon Law on the whole has even less regard than the present Statute Law for the parties' own affection, which establishes the only true and final condition of indissolubility.

NOTE.—The much-lamented death of Dr. Lacey, which has deprived the Church of England of perhaps its subtlest mind in the Canonist interest, removes the obvious commentator upon the above treatment of his theory. Perhaps some other Canonist may throw further light upon the propriety and possibility of Dr. Lacey's theory.

<sup>1</sup> An impediment of 'divine law' would not admit of dispensation, and since in that case the marriage would be void *ab initio*, the condition of ineradicable union could not in any event have been created.

## CHAPTER II

### THE RESTRICTIONS ON DIVORCE: A 'PENAL' LAW

The history of Marriage and Divorce in England shows that the English people is now governed by a law which is far less liberal than in the days before the Norman Conquest. In Anglo-Saxon England the indigenous law provided a variety of grounds for divorce, together with conditions on which re-marriage might follow; and of these grounds mutual consent was not only one, but the condition on which the others could operate. But at the Norman Conquest the Roman Canon Law, beloved of churchmen and masquerading as the rule of Christ, replaced the customary laws of England; and now, after the agelong tyranny of foreign ecclesiastical jurisdiction, the English people might well go to the Legislature with the just demand, 'Give us back our ancient law.' For that would be none other than 'our ancient liberties.'

The appeal to 'antiquity' is commonly used to lure the Englishman to repudiate the Reformation, and to accept a system which is neither ancient nor modern, but mediaeval. It rarely suggests that the Englishman should find a true heritage of 'life and liberty' in the ancient history of his own country, before the papal influence had perverted the national custom with foreign ecclesiastical canons. 'Antiquity' appears to be a relative index, suggesting what its patrons arbitrarily conceive to be authoritative.

To-day in England, after these long centuries of imported ecclesiastical authority, the Canon Law, retained in default of reform and in a large measure re-enacted by statute, claims a prescriptive right; and the law-abiding nature of the English people too readily admits this claim. By comparison with the contemporary conditions of those countries which have recovered in any measure the principles of the old Roman Civil Law, the progress of England, the land of liberty, has been halting, half-hearted, and frustrated by ecclesiastical prejudices which are nothing but the legacy of the Roman Canon Law surviving in the blood of an officially Protestant people.

The argument involves a continual reference to the history which Book I recounted. Reason and Religion alike were held to justify the breach with the Canon Law doctrine of indis-



solubility, when, after the Reformation, the procedure of divorces by a private Act of Parliament grew into an established practice. The complication and expense of this procedure, which confined its employment to the rich and privileged, contributed to the strength of the agitation which issued in the Matrimonial Causes Act of 1857. This Act did not introduce adultery as a new ground of Divorce, but adopted it from the previous procedure in the House of Lords. But while a suit for dissolution of marriage on the ground of adultery was thus facilitated by the abolition of the former cumbrous procedure and by the reduction of cost, it was commonly considered to be a reprehensible expedient, and it was not for many years either that suits for divorce were brought otherwise than on the true ground of adultery, or that the practice of undefended suits became common. It is now seen that marriages break down on many other grounds than the adultery of a respondent; and that while these grounds may, of course, involve serious faults on the part of the married persons on both sides, they do not necessarily imply conscious offences. But where such offences are conscious and calculated, as for example deliberate cruelty or malicious desertion, they may be far more destructive of marriage than the single act of adultery, of which alone, for the purpose of a decree of divorce, the Court can now take cognizance. There may be no deliberate act at the root of matrimonial breakdown, but only the unaccountable but more destructive influence of deadly hatred or continuing fundamental incompatibility. These may be faults, or misfortunes, or both; but, whatever be the offence which they imply, it is not necessarily a sexual offence of any kind, whether adultery or such a measure of unchastity as would furnish legal evidence of adultery. On the grounds of cruelty and desertion, the Statute Law, following the principles of the old ecclesiastical law, and in some measure enlarging them, allows only a permanent separation. On the grounds of deadly hatred and incompatibility, unless these furnish evidence of cruelty or can be cloaked under real or artificial adultery, the law gives no relief. Therefore married persons who desire divorce, on grounds however reasonable, must bring a suit in the High Court, wherein one spouse must prove the other to be guilty of adultery. It is, in practice, of no account who is guilty, provided that the evidence of guilt is sufficient and that the decree is not barred by the collusion of the parties

or the guilt of the petitioner.<sup>1</sup> Thus the only means of obtaining a divorce is by proof that one of the spouses is an adulterer, or is guilty of at least some equivalent sexual offence. One spouse may generously volunteer the rôle of sinner and allow the other who is actually guilty to bring the suit; but if evidence is brought to show that both are guilty, the relief is jeopardized. Such is the enduring penal influence of the Canon Law in present practice, that while the relief of dissolution can be given only on the ground of this sexual offence, it will be withheld from a petitioner who has promoted it, planned it or forgiven it; and it may be withheld from a petitioner who is guilty of the same offence, or other offences which could have conduced to that of the respondent. Again, however disastrous be the matrimonial breakdown, relief can be obtained only by proof, which may be fictitious, of an offence which brands the offender as an outcast from conventional society and a sinner in the judgement of the Church. To-day society has grown more liberal in its hospitality to matrimonial misfits, and the Church has in this respect lost much of its influence; but the Law goes unreformed, and cannot but countenance the fictions which evade its intentions, because they furnish the only humane outlet and the lesser of the two alternative evils of artificial divorce and illicit unregulated cohabitation.

The penal character of the inherited legislation demands especial attention at the point where its effect is the most acute. For while the law provides that a decree of dissolution shall be given where adultery is proved, it requires that such decree shall be refused in spite of proof of the offences alleged, if there is evidence that the petitioner so far acquiesced in the respondent's habits as to encourage the offence, or that there was an unlawful agreement between the parties to bring the suit, or that the petitioner had so far forgiven the offence as to restore the offender to the state of 'bed and board.'

It is a cry of reformers that where a petitioner seeks a dissolution every effort is made by the law, and the Courts which administer it, to prevent a divorce which is not the subject of a splendid antagonism between the married parties. There is some justification for this charge. If both parties agree that the marriage is a failure, and the least evidence of their agreement

<sup>1</sup> Or by one or another among the rest of the Absolute and Discretionary bars; Judicature (Consolidation) Act, 1925, s. 178.

having been instrumental in bringing the suit reaches the Court, then they will be compelled to remain married. Yet the Courts are unable to prevent a large amount of collusion which cannot technically be proved. For in the present state of the law, no matrimonial exasperation which makes marriage intolerable can be heard unless it be, as it were, squeezed through the narrow channel of adultery, and presented on that ground; so it is that, in a multitude of examples, adultery, agreed upon between the parties, becomes the one avenue of escape. The present law has been framed to satisfy 'straightforward' suits. It meets the case of a spouse who has been affronted by the actual adultery of the other party, who has not wittingly given cause to justify the act, who has in no wise agreed with the other party to present such a case to the Court, who is in no mind to forgive, and who is in fact outraged to the point of desiring the total disappearance of the other partner of the marriage. The law is framed for the benefit of this minority, and compels all the other victims of matrimonial misery, who may have much deeper and more abiding grounds for ending bad marriages, but who could part in friendship if they could only part, to go through this stereotyped procedure of sexual immorality. Yet the moment they show that they have mutually agreed to meet the requirements of the law, the law refuses them the only relief which it can give.

We have laboured these points of the incidence of the Absolute Bars, at the risk of some monotony, in order to press their complete irrelevance to a very large proportion of the matrimonial troubles which lead to the Divorce Court. Perhaps then it will be admitted that when married persons find their marriage to be a failure, are mutually agreed that they have made a mistake, and are convinced that the solution of their problems lies in dissolution (i.e. in legal registration of the moral dissolution which has taken place), and in the re-marriage of one or the other, or both, to other partners, there is no suitability in a law which provides for the operation of these bars. For, first, there is not necessarily any offence on the one part, at which the other party has connived, or which the other party has condoned. Secondly, collusion, or the agreement to present a case which appears to be antagonistic, or at least represents one party as guilty of a matrimonial offence, can only arise through the legal system which itself promotes it. It is, in fact, the most innocent

cases of matrimonial misfortune which encounter the greatest obstacles in obtaining relief. If the relief desired is dissolution with freedom to re-marry, one of the parties must commit adultery, or at least the other party must have sufficient evidence to prove that offence in Court. Thus the law requires evidence of an offence which very possibly neither party desires to commit and which may actually be abhorrent to both. To avoid the positive guilt of adultery, one of the parties must make a pretence of it in order to furnish the other with the requisite evidence. But if, in addition to the evidence of the adultery, the evidence of its having been mutually designed to meet the requirements of the law also reaches the Court, then the relief will be barred on the ground of collusion. Connivance would not necessarily operate in a case where the agreement was strictly mutual, but it would bar relief if one party actually influenced the other to commit the offence, or were even accessory to the other party's plan for doing so. Condonation would bar relief if after the act of misconduct, or after the occasion which furnished the evidence of the misconduct, the other party received the offender in the normal relations of a spouse. Thus the law is every-wise penal.

If the relief which the parties desire is not dissolution and re-marriage, but permanent separation, this, as we have seen, can be obtained on other grounds, viz., adultery, cruelty, desertion, and refusal to comply with a decree for the restitution of conjugal rights. But here again the same bars operate. The separation may be desired on the ground of matrimonial failure, not on any of the statutory grounds; but the Court cannot give relief on any other but the statutory grounds. If then, in addition to the evidence of one of the offences requisite for relief having been committed, evidence also reaches the Court that the case is collusive, or that the offence has been condoned, the relief will be barred. Thus again the law is every-wise penal.

The course of reform plainly lies in the restriction of these bars to suits to which they strictly apply. This reform will require the introduction of other procedure to meet the needs of those people whose matrimonial breakdown does not match the narrow and penal conditions which under the present law are requisite for relief. This will provide our subject in Book IV.

In the meantime there is place for a brief enquiry into the possible propriety of the absolute bars in some suits. To realize

where they are appropriate may help to a clearer understanding of their complete impropriety in the great majority of suits. The assumption that adultery, which is the sole ground on which the law allows a dissolution, is also the sole ground on which a dissolution will be desired, is the key to the true function of these bars. It is an error to suppose that the majority of suits for divorce are promoted by the single act of adultery, which is the requisite legal ground; for the adultery is far more frequently the result than the cause of matrimonial disagreement: yet there are suits which are genuinely brought on no other ground, and one party is affronted, offended and utterly alienated by the discovery of the other's adultery, and by that alone. It is in such a case that the absolute bars apply; and we may surmise that it was only such cases which the Legislature could assume in the conditions of 1857, when it retained these bars from the previous ecclesiastical *régime*. In such a case the offended spouse could hardly plead the offence of the other if he had consciously promoted or encouraged it, or if he had planned it in mutual agreement with the offender, or if after discovery of its commission he had so far forgiven it as to receive the offender back into the normal conditions of marital life. The bars are rightly intended to ensure that the grievance of the petitioner is genuine. But the assumption of the present law is that there is only one ground of offence, and that the law is soundly framed in that it disallows any other ground. The new conditions of to-day and the new understanding of marriage have completely upset this complacent assumption, and show that while in conditions of affection a single act of adultery will but rarely lead to a suit in the Court, in other conditions the single act of adultery is but the factitious, or even fictitious, evidence of ulterior and fundamental disagreement, which strikes far more deeply at the heart of matrimonial happiness.

Although a more generous tendency has of late years been observable in the Court's exercise of the discretion,<sup>1</sup> it was for many years habitual to interpret the discretion with such severity that the petitioner's guilt commonly figured as hardly less than an absolute bar. Recent practice has relaxed the penal quality which the Court gave to the discretionary bars, but has not

<sup>1</sup> Judicature (Consolidation) Act, 1925, s. 178 (3); *vide also supra*, Book II, Section II, Chapter III, sub-section iv; and *infra*, Book III, Section I, Chapter IV.

corrected the fundamental mis-interpretation of the statute which illustrates our argument in this chapter, and will provide our thesis in the next chapter but one.

At this point it will be relevant to consider briefly the question which the existence of the bars to relief raises, viz., Upon what principle is divorce granted? The basic principle of the Law of Divorce is admittedly nebulous, and has even been described as undiscoverable. Nevertheless, this absence of obvious, or even of recondite, principle does not rule out rival theories. We have remarked the penal character of the matrimonial legislation which incorporated the principles and procedure which were inherited from the Canon Law. Yet, even so, the emphasis is found to vary between the conceptions of Divorce as a reward for the innocent and a punishment for the guilty. The Canon Law 'divorce' *a mensa et thoro* no doubt provided a measure of relief to the petitioner, yet permanent separation with no right of re-marriage might be interpreted as a punishment for both parties. As Bentham observed in *The Theory of Legislation*, 'The ascetic principle, hostile to pleasure, has only consented to the assuagement of suffering. The outraged woman and her tyrant undergo the same lot.'<sup>1</sup> But the theory of Divorce as a punishment breaks down to-day, because so often in practice, as is well known, both parties desire the divorce. And this is not only the experience, and indeed a commonplace, of practice, but the conclusion of academic thought. For as Professor Geldart wrote in his *Elements of English Law*, 'The fact that Divorce, while it is in theory a punishment for the guilty party, is in many cases equally desired by both parties, makes it probable that there will often be collusion between them.'<sup>2</sup> The theory of Divorce as a reward for the innocent party perhaps comes nearer to the more liberal currents of thought which have come to influence modern practice. Yet here, again, the successful petitioner is not necessarily innocent; and, in spite of the bars to relief, a guilty petitioner may have the 'reward' of relief, which the respondent gratefully shares.

These conceptions of reward and punishment are irrelevant to too many divorce cases in modern practice to provide a principle either for legislation or for adequate administration. The conception which fits the facts of practice, and alone offers the

<sup>1</sup> p. 229.

<sup>2</sup> p. 92.

basis of any rational reform, is that which underlay the recommendations of the Royal Commission, viz., that marriage ought to be dissoluble on any grounds which frustrate the fundamental purposes of marriage. The Royal Commission adopted the principle enunciated by Lord Gorell in *Dodd v. Dodd*.<sup>1</sup> This we may call, in contrast with the doctrines of reward and punishment, the doctrine of 'relief where relief is needed'; and, as we accept this doctrine as the principle of reform, so we reject the conceptions of reward and punishment. For when, as in most divorce suits to-day, both parties desire the divorce on some variety of the fundamental ground of incompatibility—which means mutual unhappiness—the overt act of adultery, which furnishes the legal ground, is a product, or even a by-product, of the true ground. Therefore the administration of a law which assumes that adultery is the true ground must often be embarrassing to the administrators. It is only because modern Judges have attempted, as far as is possible, to interpret the law in accordance with the known facts of modern life, that a law so little reformed as the present English Law in Matrimonial Causes has survived as a working possibility.

<sup>1</sup> [1906] P. 189.

## CHAPTER III

### INNOCENCE, GUILT AND 'CAMOUFLAGE'

The Absolute and Discretionary Bars, evil as their incidence may sometimes be upon the course of justice, clearly testify to the Court's recognition of the possible guilt of an otherwise successful petitioner. The petitioner's case on the ground of the respondent's adultery may be adequately proved, yet it may be dismissed on the ground of one of the absolute or discretionary bars. To state these facts of present law is not necessarily to subscribe to the ecclesiastical doctrine which underlies them, viz., that petitioners must come to Court with clean hands; for it can with difficulty be maintained that the dissolution of a marriage is less desirable when the parties are unsatisfactory to one another than when only one of the parties is presumed to be at fault. The purpose of referring again to the existence and effect of the legal bars to relief is to show that the law recognizes the fact that a respondent's guilt may be caused by the petitioner's conduct. When such conduct on the part of a petitioner becomes known to the Court it may act as a bar to relief. If such conduct falls within the definition of one of the absolute bars it will deprive the petitioner of a decree without any doubt or discretion. If it is less categorical and is subject to the Court's discretion, it may, but will not necessarily, deprive the petitioner of the relief for which he or she prays. If, then, the Court does not exercise its discretion to dismiss the petition (commonly quoted as exercising its discretion in favour of the petitioner), it will pronounce a decree of dissolution in spite of proof of guilt on the part of the petitioner. This more liberal tendency began, as we have seen, with the case of *Wilson v. Wilson*,<sup>1</sup> when the President regarded family interests as overriding the disqualifying effect of the petitioner's guilt; and from that time a much greater consideration has been given to guilty petitioners, saving the outstanding case of *Apted v. Apted*.<sup>2</sup> The successful petitioner becomes the formally innocent party, and the respondent is known as the guilty party. In such a case as *Symons v. Symons*,<sup>3</sup> wherein the wife petitioner had been deserted by a husband who had been guilty of cruelty and

<sup>1</sup> [1920] P. 70.

<sup>2</sup> [1930] P. 246; 46 T.L.R. 456.

<sup>3</sup> [1897] P. 167.



adultery, and afterwards herself lived with another man, the guilt of the wife was known to the Court, and the wife was granted a decree. Or in the case of *Pretty v. Pretty*,<sup>1</sup> the adultery of the wife petitioner was conducted by the husband's conduct which drove his wife to leave him. Here, although the wife failed to disclose her adultery, and denied it on the King's Proctor showing cause, the Court granted her a decree. In both of these cases the Court took a large enough view to give justice on the evidence within the discretion conferred by Statute. The respondents in both cases were obviously guilty on the evidence, but so also were the petitioners in legal fact; so that, whatever allowances may rightly be made in the interest of the successful petitioners, they were in fact both adulterers. Yet they remain officially the innocent parties. Again, the Court may not in all such cases have discovered where the guilt actually began. The Court has done justice on the evidence, and probably, if the secret history of the marriage were known, it would still be found to have done justice; but under a different system relief might have been given without the overt acts of cruelty, desertion, and adultery having been required in order to bring the case into Court. Legally it is necessary now to speak in terms of guilt; but the original cause of the difference may not have been the fault of one party, but the fact of mutual and temperamental incompatibility, of which the law at present can take no official account.

This type of domestic difference grows from subtle irritations into serious cleavage and fierce exasperation, until, for example, the action of one party can be alleged as cruelty, and the other deliberately commits adultery. This is the opportunity of the first to enter a petition for dissolution. It is unlikely that the second resents the suit, and in that case the suit will probably go undefended. But the fact that the suit is undefended is no assurance that the petitioner is protected from evidence of collusion, or of some material fact furnished either by the King's Proctor (by intervention during the suit, or showing cause between the decree *nisi* and the decree absolute) or by another party. Thus, if the petitioner's cruelty were alleged to be the immediate cause of the respondent's adultery, it may be brought into Court to prevent the decree. But if sufficient evidence appears to show

<sup>1</sup> [1911] P. 83.

that the cruelty did not directly conduce to the adultery, and so to mitigate the fault of cruelty, or if the general circumstances of the family seem to demand a dissolution, the Court may use its discretion in such wise that the petitioner will obtain the decree. There the petitioner becomes the innocent party and the respondent becomes the guilty party. Or again, the suit may go undefended without intervention, and the decree be given without revision, and the parties once again will leave the Court with the same characters of innocence and guilt. In such a case it is quite clear that while the Court correctly interprets the law, the law discriminates too much between the parties, whose innocence and guilt are frequently too evenly distributed to bear this discrimination in reality. The legally requisite antagonism is obviously artificial; for, although the parties quarrelled at home, their quarrel was incidental to the system which held them united in an incompatible union. They would have parted peaceably had they been permitted. But the only lawful parting is by way of a public suit, in which one party is represented as innocent and injured, and the other as inconsiderate, unfaithful and guilty; and if the petition was dismissed or the decree *nisi* rescinded, it is not easy to picture a renewal of cohabitation in conditions of domestic peace.

These arguments do not necessarily apply to defended suits, since a respondent who defends the suit has evident reasons for repudiating the allegation of guilt, either because it did not happen, or in order to indicate a reputation for honourable life and conduct, or because the respondent still loves the aggrieved petitioner and wishes to maintain the marriage. Every argument will be used by the respondent to prevent the decree. An allegation of connivance or of condonation may serve, and evidence of collusion will be welcomed even if it reflects on the respondent as well as the petitioner; or adultery, cruelty or desertion by the petitioner may be alleged in the hope that one of the discretionary bars will operate effectively. If the petitioner obtains a decree, he or she will be the innocent party—rightly on the evidence—and the defending respondent will with equal formal justice be held guilty. Here the conclusion of the Court will generally be accepted even by the moralist; and yet the Court may never have the opportunity of learning a remoter cause of the matrimonial trouble which could lay the moral responsibility upon

the legally 'innocent' petitioner. And even if the Court knew, it could take no cognizance of it unless it fell within a statutory definition. The legally guilty but loving spouse may have erred in intelligible reaction from the sexual chill of an unsympathetic petitioner. Here again legal innocence and guilt are not conclusive indication of the true source of the trouble.

Again, if the respondent by cross-petition proves the case against the petitioner and gains a decree, the petitioner becomes 'guilty' and the respondent formally 'innocent.' Or perhaps the respondent successfully answers the petition and awaits the refusal of the decree. The petition will, in colloquial language, have 'done the petitioner no good,' for both character and pocket will have suffered; and it is unlikely that the respondent, whose private life has been brought into publicity, will escape some measure of disgrace. 'Guilt' and 'innocence' will not be matters of legal estimate, but may easily figure in private recrimination; and as in the previous instance of an undefended and unsuccessful suit, it is difficult to imagine anything but mutual hostility if the contending parties attempt reunion in their former home. When Lord Hannen dismissed a petition after a respondent's successful defence, and urged the parties to return to one another, his quotation from Vergil exemplified the embarrassment of the situation with an ironic touch: '*Forsan et haec olim meminisse juvabit.*'<sup>1</sup>

If the suit is dismissed because the petitioner has failed to prove the respondent guilty, enough will probably have been said or insinuated in Court to suggest the guilt of both. Reputations will have been blasted with no compensating benefit to either party, and the hope of future happiness will have been scotched.

The remote possibility of a judicial separation, as the second best in such cases, would only condemn both the unhappy spouses to lifelong celibacy or illicit union, and such a solution would be childish if it were not tragic.

Or it has happened often enough that a match-making mother or a jealous stepmother has succeeded in marrying a girl in her 'teens to some man of rank or substance whom she hardly knows. This is less likely to happen in these days of women's rights and youthful knowledge, although even now numbers of young

<sup>1</sup> Quoted by Mr. E. S. P. Haynes in *Divorce Problems of To-day*, p. 75. The quotation is from the *Aeneid*, I, 203.

women know so little when they marry as to suffer an early sexual aversion. The bride, never stirred to affection for her husband and knowing nothing of sexual life, resents all intimacy and leads a lonely life, while her husband makes no effort to understand, conciliate, or recognize his accepted obligation, and when his daily occupations are over, foregathers with his own friends. Sooner or later the wife meets another man who awakens her interest and affection. The result, which in such conditions may be thought to be humanly inevitable, leads to a suit for divorce. If the husband is very chivalrous, he may give his wife evidence on which she can base a petition. The suit thus goes undefended. The husband passes for the guilty party, and, if no evidence of collusion comes to light, the decree in favour of the wife gives a kind of rough justice. But the case is not always so easy or so fair. The husband is not always so obliging. He ought not to have married as he did a bride whose marriage was little better than purchase in a slave market; yet he may have been genuinely aggrieved by the failure of the marriage, strongly resentful of his wife's unfaithfulness, and fiercely jealous that when she had refused access to him, she should have yielded to the sexual attraction of another. So the husband petitions on the ground of the adultery of his guilty wife. The decree is granted. He is the innocent party, and she goes through life as the guilty. It is technically true. But in the scales of equitable justice none can fairly uphold the stigma of disgrace which conventionally follows the woman who had been the victim of a conspiracy before she knew her own mind. If the modern girl is generally proof against such dirty work, there are relics of the practice still to be met with; and if all the previous history were known, it would reverse in the Court of ethics many decrees, quite correctly given on the evidence, in the Divorce Division.<sup>1</sup>

Or again, the Christian virtue of forgiveness may be distorted and applied under the name of condonation to strange mis-

<sup>1</sup> Such a case could rightly be brought as a suit not for dissolution but for annulment, either by the husband on the ground of what has come to be known as 'constructive' impotence (*vide infra*, Chapter VIII of this Section, subsection (ii), *G. v. G.* cited); or by the wife on the ground that the contract of marriage lacked her consent, because in the absence of consent a marriage is void *ab initio*. This impediment could be alleged by a third party, but impotence only by one of the parties to the marriage. On the point of lack of consent cf. the Marlborough case, *infra*, Chapter V of this section.

## MISCHIEFS OF THE MARRIAGE LAW

carriages of justice. A husband commits adultery, but is afterwards received by his wife in the unqualified condition of cohabitation, or at least the evidence satisfies the Court that they are living as husband and wife. The wife, having thus condoned her husband's adultery, cannot make use of his offence as an answer if she is guilty of the same offence and her husband petitions for a dissolution. The husband discloses his former guilt and its condonation; and because the wife has once generously forgiven her husband she is deprived of a defence.<sup>1</sup> The husband gains his decree and becomes the innocent party. The forgiving wife, who has made the same mistake but is not forgiven, leaves the Court with the stain of guilt.

Or it may be otherwise, and a husband condones his wife's adultery; but so soon as the forgiven wife has evidence of the same offence on the husband's part, she petitions for dissolution. If her offence has not been anywise revived, the absolute bar of condonation protects her from the operation of the discretionary bar of adultery. She is guarded by the condonation of her former offence. The forgiving husband is divorced as the guilty party, and the wife becomes a model of injured innocence. In such cases only a detailed history of private life would enable us to be sure of the true cause of the trouble. The ecclesiastical bars to relief are frequently no more than herrings trailed across the track of truth.

Sometimes a case is more complicated, and a wife finally gets justice because an offending husband has driven her into guilt and afterwards condoned it. A husband commits adultery, deserts his wife, and leaves her without means of subsistence, as in the case of *Morton v. Morton*.<sup>2</sup> This was a discretion case, in which the wife petitioner enjoyed the benefit of the discretion in spite of her adultery. Although *Coleman v. Coleman*<sup>3</sup> does not appear to have been cited at the hearing, the condition of destitution, in which the wife was left by the adulterous and deserting husband, produced a partially similar effect to that which in the earlier case set a precedent, accepted and approved by Lord Penzance, for

<sup>1</sup> Unless by some equal or lesser offence (*Houghton v. Houghton*, [1903] P. 150) the husband's condoned adultery is revived. Even condonation by deed does not necessarily bar revival (*Norman v. Norman*, [1908] P. 6), unless the deed contains a provision that past offences will not be revived with reference to future offences (*Rose v. Rose* (1883), 8 P.D. 98), and the deed is specially pleaded.

<sup>2</sup> (1916), 32 T.L.R. 484.

<sup>3</sup> (1866), L.R. 1 P. & D. 81.

the exercise of the discretion. The deserted wife, finding a sympathetic male friend of her husband's, fell into an adulterous union with him for a year. Later, the husband, having invited his wife to join him for a night before he went abroad (whence in fact he did not return), thus condoned his wife's adultery. There is here an element of the principle of *Anichini v. Anichini*;<sup>1</sup> but the application is not at all points relevant, because the point in *Anichini*'s case was that the petitioner's guilt had been condoned long before the adultery complained of by the petitioner. In this case the wife's enforced destitution and the condonation of her guilt gave the wife a decree on the ground of the husband's adultery and desertion.<sup>2</sup>

In such a case as the above the wife may rightly pass for the innocent party, because on the evidence the husband's offences caused her fall. Yet the details of earlier matrimonial history might throw another light. The guilty but forgiven petitioner might have been a nagging wife; but such evidence would not be relevant under the statute. It is probable that in this case justice was done, not only in law where it is clear, but also in ethics. Yet such a case shows the large loophole through which ethical injustice may subsist while the law determines innocence and guilt with the aid of the ecclesiastical bars to relief.

The Statutory Bars to relief do not necessarily figure in these suits; but their existence and operation in some suits show that the law realizes that there may be guilt on both sides. There are cases in which the bars to relief play no part, and the decree is given to a party who is in fact guilty, while an actually innocent party figures as the respondent. We have already noted the case of the chivalrous husband who furnishes his guilty wife with the requisite evidence, allows himself to be cited as respondent and makes no defence. Such a husband is not necessarily responsible, as in our previous illustration, for contracting a marriage with an immature girl who was thrown at his head. He may have had a genuine affection for an entirely unsuitable wife, and when the marriage breaks down he likewise allows his wife to divorce him. He remains silent about his wife's shortcomings and offences, and it is unlikely that they will be brought to the notice of the

<sup>1</sup> (1839), 2 Curt. 210.

<sup>2</sup> Before the M.C. Act of 1923 (13 & 14 Geo. V, c. 19) the two grounds were requisite.

Court. So that the offending wife will pass for the innocent party and the innocent husband will be accounted the guilty.

There is another example in which guilt and innocence are so immaterial to a collusive agreement that the parties are found to 'swap horses in midstream,' and yet not necessarily with disastrous results. A presumably innocent wife proposes to petition for dissolution on the ground of her husband's adultery, and the husband agrees that the suit is to go undefended. Apparently the wife is as guilty as the husband; the husband changes his mind and ceases to be as amenable as at the first. So that when the case comes before the Court the husband figures as the innocent petitioner, and the formerly 'innocent' wife is now divorced as a guilty respondent. Again, a wife petitioner pleads her innocence in a suit for the divorce of her husband, but confesses privately that she had connived at her husband's adultery by encouraging his association with likely women. The husband is technically guilty, but the wife who leaves the Court as the innocent party cannot escape the true charge of guilt. Of course, if the connivance had been known to the Court, there would have been no decree at all, and presumably the husband preferred to be a free man even if he were known as a guilty one.

In such examples as the above the husband not only passes as the guilty party, when the guilt is actually the wife's, but, as we noted in our study of 'The New Legislation in England' (Book I, Chapter VI), he is liable under statute to be ordered by the Court to provide maintenance for the wife who has divorced him. The Court may amend the order, but there is no specific provision that the maintenance shall be *dum sola*, i.e. subject to her remaining unmarried; so that a husband who in fact is not guilty may find himself maintaining his former wife even after she has re-married another husband. This may be not only a considerable hardship on the count of expense, but also a source of periodical trouble in checking the exacting demands of an avaricious claimant. Thus in the present state of the law the inversion of justice in relation to 'innocence' and 'guilt' does not always cease even with the pronouncement of the decree.

In the present state of the law a divorce suit has frequently to be arranged with an eye to the greatest facility and convenience. The Court pronounces honestly on the evidence; but if the truth is concealed, the Court cannot always guard against all collusion,

or obtain all the evidence which would bring other bars into operation.

It is, of course, well established in practice by cases in the days of the old ecclesiastical courts, and has been upheld in the Court of Appeal,<sup>1</sup> that proof of adultery does not necessitate evidence of the actual fact of adultery in such wise that the parties must be caught in the act. Proof of the circumstances which point to it, or proof of the conditions in which it is a clear conclusion, is sufficient. Propinquity presumes guilt, otherwise few cases would be proved; and where evidence is given to the effect that the parties have actually been found in the act of adultery, it is regarded with suspicion.<sup>2</sup> As Sir William Scott said in *Loveden v. Loveden* (*supra*):

'It is very rarely indeed that the parties are surprised in the direct fact of the adultery. In every case, almost, the fact is inferred from circumstances which lead to it by fair inference, as a necessary conclusion; and unless this were so held, no protection whatever could be given to marital rights.'

But, of course, when a petition can be filed on the evidence, as thus understood, of a single act of adultery, the possibilities of fabrication are plain. There may be no actual adultery, but only an agreement between husband and wife to furnish evidence of it, because the disagreeable publicity, scandal and expense are worth facing for the sake of recovered freedom and possible marriage with new partners. One of the parties will then adopt the rôle of guilty party, and furnish the requisite evidence by staying at a hotel with some person, known or unknown, and producing the hotel bill in evidence, even though no act of adultery took place. This party, usually the husband, then is 'guilty' in the view of the Court and is publicly assumed to have been guilty of adultery. Or it may be a wife who stays with her future intended husband and furnishes similar evidence, even though, as in the previous case, no adultery actually took place in the hotel. This may be the only way out of an intolerable marriage into one which promises greater happiness. It is a condemnation of the present law, but hardly of the party who incurs the unmerited charge of guilt.

<sup>1</sup> *Allen v. Allen and Bell*, [1894] P. 248 C.A., approving *Loveden v. Loveden* (1810), 2 Hag. Con. 1, *per* Sir Wm. Scott, at p. 2.

<sup>2</sup> *Alexander v. Alexander* (1860), 2 Sw. & Tr. 95.



The President of the Probate, Divorce and Admiralty Division, Lord Merrivale, having realized the empty sham involved in this collusive device, has lately refused to accept the circumstantial evidence of such single acts in hotels; he began to make a stand in 1928 in the case of *Aylward v. Aylward*,<sup>1</sup> but this exercise of discretion might well seem to be *ultra vires* in view of the fact that the Statute gives no such discretion, and that the proof of adultery is inferred from the circumstances (as in *Loveden v. Loveden*, *supra*). And if the alternative is to be evidence of a protracted period of cohabitation with the actual person with whom marriage is intended, this can hardly be considered a very happy improvement. Mr. A. P. Herbert has written in his amusing way:

'If two or three years can change the period of cohabitation necessary to prove adultery and secure a divorce from one night to three weeks, in 1935 it may be six months or a year. Almost without notice a new legal fiction has come into being—Divorce-Court adultery as opposed to actual adultery. If things go much further, the guilty couple may be compelled to embrace in Court, or go to bed publicly in Trafalgar Square.'<sup>2</sup>

The new mode of proof may merely add to the volume of vice, when the true need is such a reform of the law as will enable unhappy spouses to obtain divorces on the true grounds of matrimonial collapse.

Of course, the new mode does not necessarily involve protracted illicit cohabitation, although there are cases in which the evidence might not be considered sufficient without it. It may mean no more than a definite verification of the name of the person with whom the misconduct is alleged to have taken place, in addition to an hotel bill which does not disclose it. It is true that the Court has generally required evidence that the parties have been in the situation from which adultery may be presumed, e.g. have occupied the same room. But the point is now that the Court has made a serious effort to press for proof beyond the circumstantial evidence which hitherto has been accepted. In the present state of the law, wherein adultery is the only ground which the Court can recognize, whatever be the root ground of matrimonial failure, this attempt to correct the scandal of abuse invites these consequences: (1) a definite decision that the new procedure of

<sup>1</sup> 44 T.L.R. 456.

<sup>2</sup> *Week-End Review*, June 7, 1930.

withholding a decree for lack of this information is *ultra vires*, (2) an increase in the volume of adventitious adultery in order to furnish adequate proof, or (3) a reform of the law extending the grounds on which a petition for dissolution can be based.

During the year 1930 the new practice of increased scrutiny has been seen in process of execution. In three cases Mr. Justice Hill, whose regretted retirement has removed a very considerate Judge, had cause to direct enquiries to be made in order to ascertain the name of the unknown woman with whom the adultery of the respondent was alleged to have taken place. On February 10, 1930, this Judge let a case stand over in order that the respondent should furnish the name of the woman. Failing this, enquiries would be made to discover the identity of a woman with whom, on the evidence of the petitioner, the respondent admitted that he had been living for nineteen months. The Judge observed that the husband might find this very expensive, and the woman might find herself cited and served as passing as his wife.<sup>1</sup>

Again, on March 3, 1930, in *Parsonage v. Parsonage*,<sup>2</sup> Hill, J., having secured the name of the unknown woman after previous adjournment, granted a decree *nisi*, but stated that he intended to pursue this practice of enquiry 'where a husband respondent can give the name of the woman and will not, and the rule will always involve the husband in costs. . . . If husband respondents keep the name back it will be very expensive for them.'

Again, on March 24, 1930, in *Oldham v. Oldham*,<sup>3</sup> Hill, J., granted the wife petitioner a decree *nisi*, together with the additional costs involved by the same enquiry into the identity of the unknown woman with whom the adultery of the respondent husband was alleged, the said additional costs amounting to between £60 and £80. Again, on November 5, 1930, in *Woolf v. Woolf*<sup>4</sup>—a case which had been twice adjourned by Hill, J., on March 31st and April 10th, first in order to ascertain the name of the unknown woman, and secondly to enable the King's Proctor to make enquiries—the President exercised what may be called an extra-legal discretion to dismiss the petition. In spite of all the pressure which had been brought, the husband respondent still refused to disclose the name of the woman.

<sup>1</sup> *Vide The Times*, February 11, 1930.

<sup>2</sup> *Ibid.*, March 4, 1930.

<sup>3</sup> *Ibid.*, March 25, 1930.

<sup>4</sup> *Ibid.*, November 6, 1930.

Moreover, the respondent had written to his wife suggesting a divorce and enclosing an hotel bill as evidence of his misconduct, and afterwards had written regretting that the Court would not grant 'my decree *nisi*'; and his language suggested that he had promoted the suit, and was regarded by both Judges with great suspicion. But the wife petitioner satisfied the Court that she was innocent, and the President admitted that the evidence furnished formal proof of the adultery. But, as we have said, the President, in pursuance of the new policy of the Court, dismissed the petition.

In the event this exercise of discretion by the President has not been upheld by the Court of Appeal.<sup>1</sup> For in this case of *Woolf v. Woolf* (*supra*), the Master of the Rolls gave judgement, together with Lords Justices Laurence and Romer, for the appellant petitioner, and ordered the decree *nisi* to be followed by the decree absolute in fourteen days. The Master of the Rolls reviewed the evidence, and held that, in spite of the distrust shown by the two Judges, the evidence of the respondent's having spent two nights in the same room with the unknown woman was sufficient proof of adultery, according to the proof pronounced to be requisite in *Loveden v. Loveden* (*supra*), in which the decision was approved by the Court of Appeal in *Allen v. Allen and Bell* (*supra*). It appears, therefore, that the so-called 'hotel evidence' is valid evidence; and not the Court, but only the Legislature, can correct the abuse by a change in the statutory law and an extension of the grounds. Then, when the ground is really adultery, there will be adequate proof of such adultery. Whereas now adultery is commonly but a by-product of a broken marriage, the true ground of matrimonial breakdown would then be cognizable by the Court, and productive of the requisite relief.

The examples show in sufficient variety the relation of innocence and guilt, as they are determined on the evidence before the Court, with the facts of matrimonial life. Perhaps it would be even truer to say that these examples do *not* show that relation, or that they show that that relation is frequently not known. It is not to be suggested that anyone, on this generalization, can repudiate the High Court, or impugn the decrees pronounced by the learned Judges. None can doubt but that on the evidence,

<sup>1</sup> *The Times*, February 18, 1931.

and in the present state of the law, the judgements are correct and just. But in the present conditions of the law it is important to realize that the judgements of the Courts are findings on the facts disclosed; and that while they are true as such, they are not necessarily final in the court of morals, which must take account of circumstances and influences which the statutes do not cover. In the present condition of limited grounds, when 'camouflage' facilitates divorce and the bars to relief complicate it, 'innocence' and 'guilt' are liable to lose all save a purely legal and therefore technical meaning; and if the public mind realizes the true significance and limitation of these terms, a valuable factor in the cause of reform will have been established.

## CHAPTER IV

### THE MISINTERPRETATION OF THE DISCRETION

The Discretionary Bars, which were set out in their appropriate place in Book II, Section II, Chapter III (iv), provide further illustration of the penal colour of the law in Matrimonial Causes. But here the penal element lies less in the statute law than in its interpretation in the Court. If, on behalf of a petitioner, the allegation of the respondent's guilt is proved, and no sufficient evidence is brought against the petitioner on the ground of connivance, collusion or condonation, the Court will pronounce a decree of divorce; but this is still subject to the provision that none of the discretionary bars is held to justify the Court in refusing the decree. For if the petitioner has by his or her conduct set up any of these discretionary bars, the Act gives a discretion to the Court to refuse relief and to dismiss the petition.<sup>1</sup> The Court has interpreted the Act as intending refusal of relief with an exceptional exercise of discretion in favour of the petitioner in extenuating circumstances. But the question arises whether or not precedent and practice have interpreted faithfully the intention and the sense of this section of the Act.

The Statute Law has inherited under the Act of 1857 a large measure of the principles of the Canon Law, and has directed the Court where possible to follow the practice of the old Ecclesiastical Courts. But it is to be noted that the Court has no direct ecclesiastical precedent for the exercise of discretion in suits for dissolution, because the Ecclesiastical Courts were not empowered to entertain such suits, but only suits for 'divorce' *a mensa et thoro*. We are concerned to show that the Court has interpreted the discretion, with which it was invested by Statute, in a manner which is due to *a priori* Canon Law considerations, the doctrine that petitioners must come to Court with clean hands, and the temper of the age in which the Statute first functioned, and has in consequence exercised the discretion with an undue severity; so that even when, as recently, relief has been given much more generously in discretion cases, the new generosity has been

<sup>1</sup> Matrimonial Causes Act, 1857, s. 31; re-enacted in the Judicature (Consolidation) Act, 1925, s. 178 (3).

actually not a more correct interpretation of the Statute, but merely a concession to the demands of the present age.

The relevant section of the Act (to which reference has been made *supra*) sets out the Court's discretion in these terms:

'Provided that the Court shall not be bound to pronounce a decree of divorce if it finds that the petitioner has during the marriage been guilty of adultery, or if in the opinion of the Court he has been guilty—

- (a) of unreasonable delay in presenting or prosecuting the petition; or
- (b) of cruelty towards the other party to the marriage; or
- (c) of having without reasonable excuse deserted, or of having without reasonable excuse wilfully separated himself or herself from, the other party before the adultery complained of; or
- (d) of such wilful neglect or misconduct as has conduced to the adultery.

The words, 'provided that the Court shall not be bound to pronounce a decree of divorce,' do not carry the same sense as if they ran, 'provided that the Court shall be bound not to pronounce a decree of divorce,' etc. Yet, as we have seen,<sup>1</sup> the latter rather than the former of the two forms of words more nearly explains the practice of the Court through many years. The Court still treats the discretion as exercisable in favour of petitioners, although such exercise is far more frequent. If the practical effect has become more in accord with the intentions of the Act, we should still contend that the common conception of the discretion fails to accord with the sense of the Act.

We have already recorded the growth of the exercise of the discretion, and the great departure which the judgement of the President in *Wilson v. Wilson*<sup>2</sup> effected from the precedent established by the oracular judgement of Lord Penzance in *Morgan v. Morgan and Porter*,<sup>3</sup> and suggested that the President's judgement in *Apted v. Apted and Bliss*<sup>4</sup> was restrictive and reactionary after his own judgement in the case of ten years earlier. But while the case of *Apted v. Apted* strictly justified the refusal of relief under the terms of the Act, the judgement would properly be described not as a refusal to exercise the discretion in favour of the petitioner, but as the exercise of the discretion not to pronounce a decree. It is not necessary to repeat the circum-

<sup>1</sup> Book II, Section II, Chapter III, sub-section iv.

<sup>2</sup> [1920] P. 20; 36 T.L.R. 91.

<sup>3</sup> (1869), L.R. 1 P. & D. 644.

<sup>4</sup> [1930] P. 246; 46 T.L.R. 456.

stances of the case of *Apted v. Apted* beyond the fact that the petitioner was guilty of adultery, that he did not confess the whole of his guilt, and was found guilty of contempt of Court in consequence. But he was prepared to marry the woman with whom he was cohabiting; and on the principles of discretion in *Wilson v. Wilson*,<sup>1</sup> this would seem to have justified the newly established exercise of the discretion. For it cannot be said that the granting of a decree would have encouraged immorality. On the contrary, the refusal of a decree meant that neither of the parties, the petitioner or the respondent, who were engaged in illicit cohabitation were or would be free to marry. Would not the cause of good morals have best been served by giving the husband the relief which would have enabled him to marry and lead a respectable life? We suggest that the refusal of relief in such a case is in a large measure due to the background against which the exercise of the discretion is conceived, i.e. as a favour to guilty petitioners and not as discretion to refuse a decree in such flagrant cases as, for example, where the husband caused the wife's guilt and a decree would act as a great hardship to the wife. *Apted v. Apted* was not such a case, for the wife had already petitioned for a decree against the husband ten years before and still desired a divorce.

As a result of this case the President introduced the new rule for the detailed disclosure of the facts of guilt by guilty petitioners, the result of which, as we have noted, has been satisfactory both to the Court and to guilty petitioners. Yet there again the discretion is treated as admitting of exercise only in the sense of a concession to the petitioner, rather than in that of an occasional refusal to grant a normal decree, and shows the persistence of the Canon Law doctrine of 'clean hands.' This is the substantial objection to the new rule. It reiterates the conception of the discretion which in our view has been at the root of years of injustice. This fault lies not with the Directions, which are required in order to administer the Statute Law, but rather with the narrow inherited Canon Law principle which underlies the Statute Law and assuming all suits to be antagonistic, therefore requires this inquisitorial procedure.

In the last chapter we definitely stated our adoption of the principle of 'relief where relief is needed,' in contradistinction

<sup>1</sup> *Supra*; vide also Book II, Section II, Chapter III, sub-section iv.

to the conceptions of reward for the innocent and punishment for the guilty. A reformed law would make provision for all such cases as are at present wrongly represented as antagonistic. Yet a case which is antagonistic requires appropriate procedure, and a 'root and branch' reform is apt to overlook traditional methods which may still apply to a minority of suits. For there might still be cases where not only the Absolute Bars but also the Discretionary Bars to relief would be relevant and applicable. What we have called 'straightforward' suits, such as did in fact follow the passing of the Act of 1857, presumably would still be brought by petitioners whose ground is the adultery of the respondent, and nothing ulterior. If the grounds should be extended to include cruelty and desertion, these also would in some cases be the real grounds, and not necessarily the trumped-up substitutes for conscious incompatibility. For cases in which there was an ulterior and quite genuine mutual ground of matrimonial failure, an adequately reformed law would provide other procedure; but the ground would not then be adultery, and a guilty petitioner who petitioned on the ground of the adultery (or cruelty or desertion) of the respondent would be liable to find the relief barred. The fact that such petitions, now limited to the ground of adultery, are not necessarily barred to-day, and indeed generally now obtain relief if there has been an adequate confession of guilt, is due to the fact that adultery, being the only ground recognized by the law, is known to serve as a fictitious occasion when the parties have made up their minds for other and deeper reasons that their marriage has been a mistake. Thus incompatibility and mutual consent actually operate to-day by a fiction which in any event is immoral, and tends to promote actual sexual immorality, and the consequent confusion is commonly admitted. Under a reformed system which included the true grounds of matrimonial collapse, the bars to relief would cease to operate in the great majority of cases, but would still apply to 'straightforward' antagonistic suits.

This, of course, is to look ahead to the reformation of the English Law in Matrimonial Causes. Nevertheless, it may be urged that if a reformed law retains the present bars to relief and re-enacts the existing provisions for the exercise of the discretion, the interpretation of the discretion should not continue to be directed by the Canon Law doctrine which has caused the



relief to be regarded as a favour to a petitioner whose case is proved and is not barred absolutely. And, pending any such reform on a large scale, the interpretation of the discretion under the present statute deserves in the interests of justice the attention of lawyers.

It remains therefore to enquire more fully into the interpretation of the term 'discretion' and the reading of the statute which gives the discretion to the Court. It was necessary at an early stage in this chapter to emphasize the distinction between the customary exercise of the discretion and the indicated intention of the Statute. For whereas according to the Act in the section quoted, 'The Court shall not be bound to pronounce a decree of divorce,' the practice of the Court through more than fifty years was to treat this section as though it required that the Court should never pronounce such a decree except in certain defined cases. As we have noted, these cases came to be slightly extended beyond the narrow precedents cited in *Morgan v. Morgan and Porter* (1869) (*supra*), of which the President said in his judgement in *Apted v. Apted and Bliss* (1930) (*supra*) that they seemed to be comprehended under the Common Law doctrine of Estoppel. But even since *Wilson v. Wilson* (1920) (*supra*), when the discretion began to be much more liberally interpreted, it has always been described as being 'exercised in favour of the petitioner'; whereas our contention is that where the relief is given under this section it is more properly described as a refusal to exercise the discretion. Perhaps this criticism of the Court's practice through so many years might be dismissed as audacious and unwarranted were it not that the Canons of Jurisprudence may be said to endorse the principle on which we hold that the words of the Statute rightly determine the interpretation. In Austin's *Jurisprudence*,<sup>1</sup> the learned author writes:

'The literal meaning of the words in which a statute is expressed (or their grammatical, customary or obvious meaning) is the primary index to the sense which the author of the statute annexed to them; or (changing the phrase), it is the primary index to the intentions with which the statute was made, or the primary index to the law which the legislature intended to establish.'

In the event of an interpreter finding that the literal meaning of the words does not make clear the intention of the legislature,

<sup>1</sup> Vol. II (ed. 1863), pp. 325-327.

but leaves it 'indeterminate and dubious,' the author proceeds to recite the other *indicia* to which the interpreter may then have recourse. But he insists that if the literal meaning of the words yields a determinate purpose, then the literal meaning ought to be allowed to hold good even if it vary from the other indices to the intentions of the legislature.

When Austin elaborates the 'literal meaning of the words' into 'their grammatical, customary, or obvious meaning,' his language is plain. 'Grammatical' and 'obvious' leave no room for doubt. 'Customary' might, perhaps, be interpreted to refer either to the customary sense of the words as they stand in the Statute, or to their accustomed application in the administration of the Statute in the practice of the Court. It is submitted that the point at issue is the strict sense of the Statute and the intention of its author, in contradistinction to its application in practice. Austin employs a literary solvent in order to arrive at legal truth, and permits recourse to secondary indices only when the literary solvent has failed to indicate satisfactorily the sense of the statute and the intention of the legislature in framing it. Thus he writes:

'The terms through which the legislature tried to convey its intention were probably measured as carefully as the intention which it tried to convey. And the interpreter ought to infer (unless the contrary manifestly appear), that it employed them with the obvious meaning which custom has annexed to them, and not with a sense which is unusual, and therefore recondite and obscure.'<sup>1</sup>

Here, again, it would seem to be evident that 'the obvious meaning which custom has annexed' to the words refers to the understanding of the English language, and not to the adventitious sense which particular circumstances attached to a clause, even if those circumstances, operating in a small but highly specialized circle, have succeeded in establishing that sense as an almost ineradicable practice. 'If,' writes Austin, 'the literal meaning of the words were not the primary index (or were not scrupulously regarded by the interpreter), all the advantages (real or supposed) of statute legislation would be lost. For the purpose is to give an index more compendious, compact (or lying together), and therefore less fallible, than is that to a judiciary rule. But if the interpreter might, *ad libitum*, desert the literal meaning, no such index could be given.'<sup>2</sup>

<sup>1</sup> *Op. cit.*, p. 326.

<sup>2</sup> *Op. cit.*, p. 327.

The Statute which gives the discretion to the Court carries a clear sense in English, and seems to express, as already maintained in this chapter, the intention of the legislature. The relevant words of the Statute, for the purpose of interpreting the sense of the Court's discretion in accordance with the intention of the legislature which framed it, are as follows:<sup>1</sup>

'If the Court is satisfied on the evidence that the case for the petitioner has been proved' . . . (and does not find any of the absolute bars), 'the Court shall pronounce a decree of divorce:

'Provided that the Court shall not be bound to pronounce a decree of divorce if it finds that the petitioner has during the marriage been guilty' . . . here follow the grounds on which the Court may refuse the decree.

The sense of these English words is that if the petitioner's case is proved, and the petition is not barred by Connivance, Collusion or Condonation, the Court shall pronounce a decree of divorce, but still has a discretion to refuse if it finds the petitioner guilty of certain offences. That is the aspect from which, according to the literal meaning of the words in which the Statute is expressed, the discretion is to be viewed. The assumption is that the petitioner, whose case is proved and has not been barred absolutely, shall receive relief unless the Court judges that certain specified acts or failures are serious enough to entitle the Court to refuse such relief; but the assumption plainly is not that the Court, if it finds the petitioner guilty of any of the specified acts or failures, will generally refuse relief, and exercise only an exceptional discretion to grant a decree. Yet the latter and not the former interpretation has governed the Court throughout the history of this statute. This will have been observed in the precedents above quoted, in the statistics furnished by the Attorney-General in Court in *Apted v. Apted*,<sup>2</sup> and in the judgement of the President. Even where the discretion has been, as of late, more liberally exercised in favour of petitioners, this would be more correctly described, according to the literal reading of the Act, as a less frequent exercise of the discretion against petitioners. Even in the sense most favourable to precedent and practice, the words of the Act could be taken only to mean an equal discretion either to grant a decree or to refuse

<sup>1</sup> Judicature (Consolidation) Act, 1925, s. 178, re-enacting M.C. Act, 1857, s. 31.

<sup>2</sup> 46 T.L.R. at pp. 458-459.

it. But that would not authorize the interpretation of discretion as an exceptional discretion to grant a decree as against a regular rule to refuse. The judgement in *Wickins v. Wickins*,<sup>1</sup> that the discretion is unfettered, had no reference to the aspect from which the exercise of the discretion is viewed, but only to the fact that the discretion is judicial and is therefore not to be governed by such precise and narrow conceptions as would limit a guilty petitioner's excusability to cases covered by the doctrine of Estoppel.

If the literal meaning of the words, in which the statute is expressed, did not furnish the requisite index to the determinate purpose of the legislature, then recourse would be had to other indices. Although it is not normally legitimate to go behind the words of a statute to discover its intention, as for example to refer to the words of a debate in Parliament as the result of which a statute was enacted,<sup>2</sup> this course, nevertheless, would provide a necessary contribution to the understanding of the statute itself and of the history of the statute. There is no doubt that the legislators of 1857 did not intend that the Law in Matrimonial Causes should remain as they enacted it. They intended to carry the reform further; and while they provided by statute the ground for divorce which by the previous parliamentary procedure had been the close privilege of the rich, it is inconceivable that, having piled the Pelion of the Absolute Bars upon the Ossa of the petitioner's conclusive proof of the respondent's guilt on one limited ground, they should intend to raise the difficulties to the level of impossibility. For nothing less would be the effect of imposing discretionary bars to be so limited in interpretation as to deny relief to guilty petitioners except as a peculiar favour when their guilt had been explained away.

Lord Penzance's prophecy in *Morgan v. Morgan and Porter* (*supra*) that 'a loose and unfettered discretion' would lead to anomalous judgements has no doubt been justified in the event; but the fact of discretion must in the nature of the case invite variation while it is (as Sir Francis Jeune asserted) 'judicial and not arbitrary.'<sup>3</sup> Lord Penzance's judgement, rejecting the rule of unfettered discretion, did in fact render the discretion arbitrary

<sup>1</sup> [1918] P. 265, C.A.

<sup>2</sup> In practice this is barred by a rule of the Common Law.

<sup>3</sup> *Constantinidi v. Constantinidi and Lance*, [1903] P. 246.

until the end of the 19th century. The anomalous judgements, which have followed the removal of the restraint, have been due to the aspect from which the Court has viewed the discretion. For while Lord Penzance's view of the discretion has been vastly enlarged, the aspect from which he viewed it remains: and that aspect is not supported by the literal meaning of the words of the statute. As we have just admitted, the fact of any discretion which is not arbitrary (and is therefore a true discretion) must carry some risk of variation, and the mental presupposition of the Court may exercise an influence in fixing the *ratio decidendi* in a 'discretion' case. But it may be thought that Lord Penzance's fears of vague decision and contradictory judgements are much more warranted on the customary reading of the statute than on the literal meaning of its language. The exercise of the discretion is conditional on the guilt of the petitioner—according to either reading. But the pre-supposition of the Court has always been that the guilt of the petitioner will bar relief unless a discretion is exercised in his favour. Even where the petitioner's guilt is held to be in some measure excusable, the mental presupposition of the Court causes the exercise of the discretion in the petitioner's favour to be always in the nature of an effort—never, and rightly never, congenial to good lawyers—in defiance of precedent. The present more frequent practice of exercising the discretion, in favour of guilty petitioners who have made the requisite disclosure of their guilt, must be held to be a makeshift practice, of which the menacing finger of the ghost of Lord Penzance is raised in continuing reproof. If, however, the mental presupposition of the Court were, and always had been, that guilty petitioners who had proved their case against the respondent, and whose petition had not been barred absolutely, would normally obtain relief, this standing difficulty would not have arisen. For then guilty petitioners would be barred at the Court's discretion only when their conduct had been exceptionally flagrant. The guilt-complex which seems to have directed the more 'recondite and obscure' interpretation of the statute, would have been satisfied by the sufficient safeguard of the absolute bars; for if the allegations against the petitioner are not sufficient to prove connivance, it is a strained interpretation of the statute to say that lesser guilt ought as a practice to bar relief. As we know, relief has been given much more freely of late years both before and since

*Apted v. Apted*; but discretion provides a standing difficulty and embarrassment, which would be much reduced, if the discretionary bars could be viewed and interpreted from the obvious aspect.

We are concerned, of course, with the interpretation of the words of a statute, in the true sense of interpretation. What is sometimes called interpretation is actually judicial legislation, by which the judge enlarges or restricts the meaning of words in order to give to them the effect which the legislature intended, this effect having been derived from other indices than the literal or grammatical meaning of the words. In the exercise of the discretion the judicial decision is unfettered; but the judge in exercising the discretion 'makes law' only in establishing new precedents which the terms of the statute properly contemplate. The judge is not in such a case extending the words of the statute from their grammatical or customary meaning to the meaning with which the lawgiver used them, because the lawgiver's meaning was plain; but it might be suggested that the earlier interpretation, exemplified in *Morgan v. Morgan and Porter (supra)*, was restrictive interpretation in the sense that the interpreter of the statute (i.e. the judge) allowed himself to be guided by other indices than the grammatical meaning in order to reach the meaning which the lawgiver might have been supposed to have intended. The other indices would appear to have been the restrictions already imposed by statute in the absolute bars and the Canon Law doctrine that petitioners must come to court with clean hands; together with the prejudice of the period against freedom of divorce, and the belief of the early divorce judges, and especially of Lord Penzance himself, that an unfettered discretion would lead to decisions of great variability. The result was that for many years the words of the statute,

'Provided that the Court shall *not be bound to* pronounce a decree of divorce if the petitioner has been guilty,'

were interpreted as though they read—

'Provided that the Court shall *not* pronounce a decree of divorce if the petitioner has been guilty' . . . '*unless his guilt is unwitting, unavoidable or condoned.*'

This might well be called restrictive interpretation; but, if so, it is restrictive of the meaning of the words of the statute not to what the legislators intended, because the words of the statute

are clear, but to what the judicial mind of the time regarded as permissible. The refusal of relief in the recent judgement in *Apted v. Apted* (*supra*), although a reactionary exercise of the discretion, was properly provided for under the plain terms of the statute; but, with all respect to the Victorian Judges, the restriction imposed in the 19th century rested on a false interpretation of the terms of the statute, and came perilously near to judicial legislation, which is not strictly interpretation at all. By misreading the *ratio legis*, they reached in 'discretion' cases a *ratio decidendi*, through which their own reason for the statute operated for many years as a law which denied the justice which the legislators intended.

The Act of 1857 was carried in the teeth of a strong opposition, and could not at one stroke have introduced all the reforms which its more progressive authors desired and designed. It supplanted the ecclesiastical jurisdiction in Matrimonial Causes by that of the new Court for Divorce, and established one statutory ground for complete divorce, only after considerable concession to the principles of the Ecclesiastical Courts which were derived directly from the Canon Law. This explains the survival of the Absolute Bars, Connivance, Collusion and Condonation; and a similar spirit of concession to evil ecclesiastical precedent and surviving prejudice caused the narrow and irrational interpretation of the Discretion. For in spite of the new Act, and the liberal and progressive attitude which the minds of its authors seemed to suggest, the temper of the middle and later 19th century was unsympathetic to divorce; and the practice of the new Court tended to reflect the dominant feeling. Thus the interpretation of the Act tended in the direction of making divorce difficult. To-day it may be thought that the early interpretation of the discretion would be both hard and crude, and indeed the decision in *Apted v. Apted* (*supra*) seemed to many so to be. The fact that even now, when, as is quite usual, the discretion is 'exercised in favour of petitioners,' much is often made of this concession, shows the strength of the precedents which the judges have had to overcome, and the straits to which they have been driven in order to bring an unreal interpretation of a plain provision to meet the needs of a world of realism.

The movement in the direction of increased generosity which had marked the recent exercise of discretion since the War

seemed to have been arrested by the judgement in *Apted v. Apted*; and although, in fact, the discretion is still quite commonly exercised (in the customary sense) when petitioners have observed the new rule, the habit of regarding the discretion as a favour to a petitioner, and not as an exceptional refusal of relief, continues to persist. The present generation of judges appears to be the victim of adventitious precedents, which have established a questionable reading of the Statute Law; for there can be no doubt that the customary exercise of the discretion is intimately connected with the inherited and prevalent conception of the nature of the discretion. Of course, as we have seen, it may be argued that discretion is exercisable in either direction, and that the interpretation of the term is immaterial; but it is essential to insist that the interpretation of the word in its statutory use is not an academic triviality. The sense which underlies the statute is, we submit, vital to the course of justice. The conception of discretion in the mind of the Court may be paramount in determining its emphasis. A discretion to refuse the relief, which the law intended usually to be given, would be less likely to be exercised than a refusal to exercise a discretion to give the relief, which the law did not encourage except as an occasional expedient rarely to be given. We suggest that the Court has unwittingly inherited the prejudice which set the precedents in the 'sixties of the last century; and its consequent presupposition of the nature of the discretion acts both as drag upon its own efforts to interpret the statute favourably to petitioners, and as a reason for acting with greater severity than the facts of the case would warrant under the other interpretation of discretion.

Thus the correction of this long-standing interpretation in practice is not a mere matter of words. The President's judgement in *Apted v. Apted* was, of course, perfectly correct under the section of the Act of 1857, which allows discretion to refuse a decree. But the terms of his judgement are questionably described as a refusal to exercise the discretion. Behind the verbal correction lies the intention of the Act. For, whatever defects it has inherited from the Canon Law, the Act in this matter of discretion expressed an emphasis which, according to the plain and literal reading of words, might be thought to be quite unequivocal. Yet the course of correction is not easy. An amending Act of Parliament could, of course, indicate relief as the general rule, stating definitely



that the discretion is a discretion to refuse relief, and to be regarded, not as the Victorian Judges regarded it (a concession to guilty petitioners rarely to be used), but as an occasional resort of the Court when the conditions are peculiarly flagrant. It is agreed among lawyers that a definition of discretion is impracticable so far as the circumstances of its exercise are concerned, for then it would soon cease to be discretion; but this is not to say that its direction or emphasis cannot be indicated by reference to statute. If within the limits of the present statute it is desired to administer the law more liberally in Matrimonial Causes, legal authority could no doubt effect this change without any resort to the Legislature, but in view of the new and improved conditions under the old interpretation this reform from within seems to be unlikely. What, of course, is really needed is a reform of the law on larger lines in such wise that relief will be given on the true grounds of matrimonial trouble, and the present bars to relief shall apply only where they are properly relevant, i.e. to a small minority of actually antagonistic suits.

NOTE.—In the foregoing chapter (on p. 247) it might seem that the question had incidentally been raised whether or not, or how far, the Judge can be said to 'make law,' and that the answer had been very straitly circumscribed by the reference to the exercise of the discretion. But the sentence, 'the judge in exercising the discretion "makes law" only in establishing new precedents which the terms of the statute properly contemplate,' does, in fact, admit of more comprehensive application to other judicial decisions. The question is nowhere better answered in brief compass than in the late Professor Geldart's *Elements of English Law* (new edition edited by Sir William Holdsworth, K.C., D.C.L., pp. 20-27), where the views of Hale and Blackstone, Austin and Bentham are cited, together with the more recent contributions of Sir Henry Maine and Sir Frederick Pollock. The author shows that while the judges do not 'make law' in a sense comparable with that in which law is made by the legislature, judicial decisions do definitely change, or add to, the ascertainable law (although in many simple cases the effect is imperceptible because the application of principles involves no new conclusion). While there always exists a law to meet every case, certain sets of circumstances may and do arise to which the law has not hitherto been applied; and its application by judicial decision adds to the ascertainable volume of law. So that, as he concludes, 'The "double language" which Maine refers to as an evidence of a deep-seated fiction is really an expression of a fundamental truth.' Cf. some illuminating observations by Professor Goodhart in his *Essays in Jurisprudence and the Common Law*, pp. 268-270.

## CHAPTER V

### RE-MARRIAGE: ECCLESIASTICAL OBSTRUCTIONS

Our indictment of the present system is properly concerned with those features of the inherited law which bar relief where relief is needed and frustrate the formation of fresh marriages. But it is germane to the exposure of these legal restrictions to enquire into the possibilities of re-marriage when the Court has pronounced a decree absolute. As we noted in 'The New Legislation in England'<sup>1</sup> the Legislature in 1857 provided in plain terms for the re-marriage of divorced persons so soon as the final decree of dissolution has been pronounced by the Court; and they further provided that such re-marriage, both of the innocent and of the guilty parties, might be solemnized in Church.<sup>2</sup> On only one point does the Act differentiate between the treatment of the innocent and of the guilty. Both may claim the use of the Parish Church, but whereas the innocent party is in the position of any parishioner in claiming the services of the parish clergy, or of some clergyman whom the incumbent nominates to represent him, the guilty party cannot claim the services of the incumbent or his staff. If the incumbent is willing to perform the ceremony of re-marriage of the guilty party, he is free to do so. If, however, he is unwilling, he is yet required to allow the use of the Parish Church and to permit any other duly qualified clergyman to solemnize the marriage. This provision, amended by the Judicature (Consolidation) Act only by incorporation of the restrictions enacted in the Deceased Wife's Sister and the Deceased Brother's Widow Acts of 1907 and 1921, remain the law of this Church and Realm.

This permission of re-marriage in the Churches or Chapels of the Established Church was an honest and generous provision, based on the belief that the principle of divorce on the ground of adultery was in accord with the teaching of the New Testament. It was charitable to *divorcés* in prohibiting none, whether innocent or guilty, from the use of the Parish Churches; and it was con-

<sup>1</sup> Book I, Chapter VI, *supra*.

<sup>2</sup> Matrimonial Causes Act, 1857, ss. 57 & 58; re-enacted in Judicature (Consolidation) Act, 1925, s. 184.

siderate to the clergy in enabling them to respect any conscientious scruples which might seem to inhibit them from giving the Church's blessing through their own ministrations to actual adulterers. In view of the problems, which the procedures of the Court are seen to present, it is evident that clerical discrimination under the provisions of the Act will not guarantee the restriction of re-marriage to the actually innocent or prevent the re-marriage of the actually guilty. The Act presupposes that the Church will accept the judgement of the Court as final, not merely as correct in law—which is assumed—but also as conclusive in the court of morals. In view of the apportionment of innocence and guilt by decree of the Court, in relation to the undetermined possibilities of initial responsibility for matrimonial break-down, it is evident that if the Church relies on the judgement of the Court for its authority, it may not be discharging its own moral responsibility. The legislators of 1857, of course, intended that a decree granted to a successful petitioner would be a certificate of innocence, and that the same decree would register the guilt of the respondent; and on that assumption they made this generous provision for the clergy who have conscientious objection to re-marrying adulterers. The intention of the Act is, that those of the clergy who disapprove of the re-marriage of adulterers in Church shall not be required to marry them; but, in fact, the clergy who obey the law in re-marrying innocent parties will sometimes certainly be marrying adulterers, and those who avail themselves of the permission to refuse to re-marry guilty parties will sometimes with equal certainty be refusing to marry persons who are not perhaps entirely innocent, but who at least have not been guilty of adultery.

The practice of the Church has reduced itself generally to a refusal to marry any persons who are known to have been through the Divorce Court. This is strictly to break the law, and to deprive the parishioner of his or her legal rights. The prevalence of this practice of refusal is directly due to the recovery and growth of that particular sacramental theory of marriage under which, as we noted in our study of the Canon Law, marriage is regarded as indissoluble. There is, of course, a sacramental element in all true marriage; this is the sacrament of mutual love; for where love endures, marriage will remain undissolved and indissoluble except by death. But the indissolubility maintained by the Canon Law,

and proclaimed by many churchmen, is indistinguishable in theory from any family relationship, whereby members of families remain related to one another because they are born so, and cannot escape their kinship even if they live in a state of deadly hatred. Thus the sacramentalists maintain that marriage establishes a natural relationship which is ineradicable.<sup>1</sup> One who subscribes to this view will not admit the validity of divorce, but only of nullity. He will regard divorced persons as being still married, and therefore will maintain that any person who is re-married after divorce is contracting an adulterous union. Guilt and innocence for purposes of the Court become on this view irrelevant to the after-life of these persons; and presumably the exponent of the sacramental theory would as readily re-marry the guilty as the innocent, or as readily refuse the innocent as the guilty. He would argue with perfect logic from his premisses, although many who admit his logic would reject his premisses.

But this *intransigent* attitude of many churchmen is not uniformly representative of the Church. There has been a tendency to be charitable to the innocent party, but to refuse to marry the guilty party. This is, of course, a perfectly law-abiding policy. It is obedient to the law in re-marrying the innocent, and it avails itself of the discretion to refuse to re-marry the guilty. Its only fault is that it accepts the judgements of the Court without enquiry as being true, not only on the evidence known to the Court, but also on the evidence, if any, which was not made known to the Court and of which quite possibly the Court could take no cognizance. This law-abiding policy thus involves a repudiation of religious responsibility. The provisions of the Act do not prevent the clergy from exercising their moral judgement except in one possible issue. The clergy are free to marry a technically 'guilty' party; and, if they know from personal enquiry that the technically 'guilty' party has been more sinned against than sinning, the consent to re-marry such a one will be correct not only in law but in Christian charity. If, however, they judge the technically innocent party to have been morally at fault, they would become formal breakers of the law in refusing to re-marry. The successful petitioner (i.e. the 'innocent' party) might even have committed adultery under provocation or in circumstances

<sup>1</sup> Cf. T. A. Lacey, *Marriage in Church and State*, pp. 17, 18; cf. Book III, Section I, Chapter III, *supra*.

in which the Court gave to him or her the benefit of the discretion (of which we have treated at length). In such a case the Church would be legally correct in receiving and re-marrying the party; and it would appear that if the incumbent of the Parish Church of the party had conscientious scruples, he could be subject to an injunction to perform the marriage. In practice this difficulty, as in the case of a technically guilty party, would probably be overcome by the party's either qualifying by residence in another parish where the incumbent, after possession of the facts, raised no objection, or by repairing to the office of the Registrar. This particular difficulty is not remote, but is unlikely to be active because the illegal refusal to re-marry has become so general that justice at the hands of the Church on this issue is no more expected than the support of the Church for the reform of the law.

The late Archbishop of Canterbury in the debate in the House of Lords on the Matrimonial Causes Bill in 1920 admitted that the Bishops had discouraged the re-marriage of the 'innocent' party and had forbidden, as far as possible, the re-marriage of the 'guilty.' It is difficult to justify the title of the hierarchy thus to defy the law of the land (for which a majority of the Bishops themselves had voted in 1857). But this defiance of the law has become quite general. In 1930, the Lambeth Conference of Bishops, so much applauded for the signs of growing liberality, yet voted its recommendation

'that the marriage of one, whose former partner is still living, should not be celebrated according to the rites of the Church.'<sup>1</sup>

This recommendation of the Bishops is another direct incentive to law-breaking. For whatever be supposed to be the defect of the law, and whatever reform may be thought to be desirable, no citizen, and certainly no responsible official, is entitled to break it even in its unreformed state. No doubt this resolution would go some way to satisfying the episcopal author of an advance booklet, *About the Lambeth Conference*, whose attitude is at once obscurantist and defiant. On page 124 he wrote:

'If the Lambeth Conference should, with no uncertain voice, lay down that Christian marriage is indissoluble—whatever the practical effect might be—our own communion would at least have borne faithful witness.'

<sup>1</sup> Report, p. 42.

But the writer is not even satisfied with the mediaeval rigidity of Rome; for he complains that

'the Church of Rome—theoretically sound in the matter of divorce—is apt to evade the issue, as, e.g., in a recent notorious case in which nullity was alleged after long years of married life.'<sup>1</sup>

<sup>1</sup> The reference presumably is to the Marlborough case in 1926, and shows a misconception of the nature of nullity, and indeed of the condition of marriage itself. In this case the Roman Rota upheld on appeal the declaration of the Southwark Diocesan Court, and found with perfect propriety that there had been in fact no marriage, on the ground of absence of free consent on the part of the 'wife.' It is true that the marriage purported to have been celebrated in 1895, and that the union had produced two children; but it matters not how many years the parties have been united by what purported to be marriage, nor how many children the union may have produced. If the so-called marriage was subject to a diriment impediment, and, as in this case, was celebrated without the consent of one of the parties, there could have been in fact no marriage. This principle in general is common to both Roman Canon Law and English Law, although the cases suggest that there may be some variability in the volume of pressure which is requisite to exclude consent. But *vis et metus*, force and fear, may vitiate consent and render a marriage contracted under this pressure void *ab initio*. The Court can but declare what is fact. Indeed in such a case of exclusion of consent, whatever the Court may declare (for it is possible that a Court may err and give an unsound declaration, perhaps in the absence of adequate evidence), and whatever pious opinions may be held and expressed, the fact remains that the parties were never married. Here the Roman Church is right in fact, law and logic. Marriage is by Canon Law indissoluble; but if it is void through a diriment impediment, there is no marriage to be dissolved. Thus it is strictly irrelevant to the point at issue that the parties had by mutual consent been divorced on the petition of the wife in 1920, and that each had re-married. The annulment of 1926 showed that ecclesiastically the divorce had been superfluous.

Cf. the *Eugenics Review*, July 1931, where Lord Salvesen, a distinguished Scottish Judge, now retired—who contends for a reform of the English law of divorce, and inveighs against the customary refusal of re-marriage in church—appears to decry the Roman practice of annulment as being an escape from the rule of indissolubility. He includes duress among those grounds of nullity not recognized in English law, and accordingly gives the example of the Marlborough case as one which would not be countenanced by the English law. But, with all respect to so great an authority, it cannot be maintained that duress, which denies free consent, is not a ground for nullity under the English law. Lack of free consent does invalidate a marriage in English law. Cases occur both before and since the Act of 1857 to illustrate the invalidity of marriages contracted under pressure: *Harford v. Morris* (1776), 2 Hag. Con. 423; *Bartlett, falsely called Rice, v. Rice* (1894), 72 L.T. 122; *Scott, falsely called Sebright, v. Sebright* (1886), 12 P.D. 21. In the two last-cited cases it is true that the marriages were never consummated; but the ground of annulment was not non-consummation, but the pressure under which the respondents had deprived the petitioners of freedom of consent. In the case of *Cooper, falsely called Crane, v. Crane*, [1891] P. 369, the evidence showed that the threats were not direct, and was held not to be sufficient to outweigh the presumption of

Apart from the legal inexactitude in his last sentence—for it would be more accurate to say that an impediment was alleged and that a decree of nullity was pronounced—the Bishop confuses the issue. For what is 'Christian Marriage'? The term rightly describes the only truly indissoluble marriage, that is, a marriage of love; for as the Emperor Justin pertinently asked, 'Who would wish to be rid of an ideal partner?' Presumably the Bishop cannot mean this, for then his words could mean only that marriage which the married persons themselves wish to maintain ought not to be dissolved—a question which is not in dispute. If by 'Christian Marriage' is meant merely marriage in Church, that may be no more than a legal marriage which is dissoluble on sufficient legal grounds; for a marriage which has been performed in Church may prove to be a marriage of unfaithfulness, or of incompatibility expressing itself in formal legal grounds of dissolution, when the marriage in all save the legal sense has dissolved itself in advance of the law's provisions. The law does not dissolve the marriage, but registers, where the evidence admits, the moral dissolution which has occurred. Again, if by 'Christian marriage' is meant marriage under the papal Canon Law, then 'Christian Marriage' is indeed held to be indissoluble. A decree of nullity does not dissolve it: a decree of nullity pronounces it to be null and void, i.e. declares that on account of some impediment the union never was a marriage. The spokesmen of indissolubility of marriage in the Church of England would apparently hold in irrefragable legal union not only the victims of moral dissolution, but even in some cases those whose marriages are void through lack of one of the constituents of a valid marriage. When some of our episcopal spokesmen are more Roman than the Romans, but without the Roman wit and understanding, it is

consent. While the principle is plainly established that duress, which denies consent to a sufficient degree, is a ground of annulment in English law, it is not possible to assert with complete assurance that the particular case of the Marlborough 'marriage' would have secured the same declaration of nullity in the English Court. English law offers no exact case; where the English Court has pronounced a decree of annulment on this ground, the evidence appears to have been larger; and where the English Court has dismissed the petition, the evidence has been smaller. But the evidence in the Marlborough case showed that the pressure brought upon the future 'wife' was not only indirect (viz., the effect upon her mother's health caused by opposition to the marriage which her mother had planned), but also direct (viz., her mother's threat to shoot the man with whom the daughter was in love and whom she wished to marry); and this on the evidence of the mother herself and other witnesses.

difficult to bring our official English Christianity to a clearer view.

If further evidence of the Church's attitude were needed, it could be furnished in a succession of episcopal pronouncements for many years past. There was issued as recently as the spring of 1931 the recommendation of the Bishop of Peterborough against the re-marriage in Church even of innocent parties.<sup>1</sup> When he says that such people are 'asking for something for which they have no right to ask, and indeed would never think of seeking unless they had lived in an atmosphere of continuous disregard of the rules of the Church,' he is speaking at once in defiance of the Law's provision, without regard for the serious doubts which attach to the identification of rigid indissolubility with Christian principles, and in apparent ignorance of the intricacies of the problem, as domestic matrimonial troubles and the practice of the Court alike present it. The debate in the Upper House of Convocation and the succeeding correspondence in the columns of *The Times*<sup>2</sup> gave a continuing impression of ecclesiastical determination to reject the provision of the Law and to rest on a too simple traditional interpretation of Christian teaching.<sup>3</sup>

<sup>1</sup> *The Times*, April 22, 1931. The present writer answered this pronouncement at some length in the *Saturday Review*, May 9, 1931.

<sup>2</sup> June 5, 1931, and following days.

<sup>3</sup> To these expressions have now been added the publication of the lawless method of the Diocese of Winchester (*vide An Ancient Diocese and Modern Problems*, pp. 42, 43), whereby, although no provision is made for the 'guilty' party (which shows the limited measure of the comprehension of the problem), and the re-marriage of the 'innocent' party is referred to the Registrar's Office, the 'innocent' party alone may 'in very exceptional circumstances approved alike by the incumbent and the Bishop' receive ecclesiastical hospitality in the form of a subsequent service in church, but not the marriage service. Again, the admission of such persons to Holy Communion is stated to rest with the Bishop 'as the guardian of discipline.' Apparently the Law of the Realm, as verifiable both by statute and by judicial decision, counts for nothing in these days of the administration of a new diocesan canon law. Again, the Bishop of Salisbury, at the Salisbury Diocesan Conference (reported in the Church newspapers of October 30, 1931) advocated the same 'reform,' viz., the refusal of re-marriage in Church to any divorced person, whether innocent or guilty; but he appears to have urged, wisely enough in theory, but without specific regard for the difficulties of practice, that provision should be made for the better instruction of 'engaged' persons in the nature and responsibilities of the marriage which they propose to contract in Church. Yet again, the Archbishop of Canterbury has published his desire that the re-marriage of *divorces* shall not be solemnized in church (*vide The Times* and the *Morning Post*, January 5, 1932).



That there are exceptions to this almost uniform episcopal antinomianism will be realized by the readers of our chapter on 'The Contribution of Christianity,'<sup>1</sup> which cited the statement of the Bishop of St. Edmundsbury and Ipswich. When he refused to interfere in a case of re-marriage and justified the Law of the Realm in providing for re-marriage of both innocent and guilty parties by reference to the Gospels, he set an example of legal and theological clarity which was as welcome as it was unusual; and to the words there quoted he added the following opinion, of which the legal propriety seems to be not in doubt:

'Indeed I find it difficult to distinguish the status of parties after divorce lawfully pronounced and the status brought about by the death of one of the parties, where the right to marry again is not questioned, nor would be questioned, even if the conduct of the person desiring to re-marry had been bad enough to contribute towards the death of the former partner.'<sup>2</sup>

It will not be irrelevant at this point to take further account of Lambeth. A second resolution of the conference under the heading of Divorce was passed in the following terms:

'Where an innocent person has re-married under civil sanction, and desires to receive the Holy Communion, it recommends that the case should be referred to the Bishop, subject to provincial regulations.'<sup>3</sup>

It is highly doubtful if the restriction thus recommended would be valid in law. It presupposes that in any event the 'guilty' party in a divorce suit, whether or not he or she has afterwards re-married (whether in church or otherwise), is not entitled to receive the Holy Communion; and it would even put the innocent party's rights under the discretion of a bishop. The *Solicitors' Journal* of August 30,<sup>4</sup> 1930, in an article headed 'The Bishops and Divorce,' very properly cites the analogous case of the refusal of Communion to one who had availed himself of the legal right to marry his deceased wife's sister—the famous case of *Thompson v. Dibdin*.<sup>5</sup> The right to repel 'notorious evil livers' under the Rubrick in the Book of Common Prayer cannot rightly be made to apply to those whose offence is that they have been married according to the Law of the Realm, merely because the Church,

<sup>1</sup> Book I, Chapter II.

<sup>2</sup> *Modern Churchman*, March 1930, p. 680.

<sup>3</sup> Report, p. 42.

<sup>4</sup> Vol. LXXIV, No. 35, p. 571.

<sup>5</sup> [1912] A.C. 533.

or some of its spokesmen, refuse to recognize it. In that case Lord Loreburn, L.C., said (at p. 540):

'I regret that this plea was placed upon the record. . . . It is inconceivable that any court of law should allow as a lawful cause (i.e. of repulsion) the cohabitation of two persons whose union is directly sanctioned by Act of Parliament and as valid as any other marriage within the realm.'

This judgement would apply more strongly in the case of the re-marriage of *divorcés*, because the actual right of re-marriage in church is larger under the Matrimonial Causes Act, 1857, re-enacted in the Judicature (Consolidation) Act, 1925, than under the Deceased Wife's Sister Act, 1907. The *Solicitors' Journal* thus concludes:

'Re-married *divorcés*, therefore, members of the Church of England, and living with their spouses, are entitled as of right to Communion, and the clergymen, bishops and archbishops who deprive them of it are guilty of an offence against the law. Incidentally, the distinction between the "innocent" petitioner and the "guilty" respondent has no substance in the twentieth century, when husbands with the entire approval of their wives stay in hotels for a night with other women because the law offers them their freedom on no other terms. In such cases the wife is as morally guilty of the offence (or supposed offence, if it does not actually take place), as the husband.<sup>1</sup> The bishops still appear to live in a mediaeval atmosphere of their own, and, while they do so, cannot justly complain if young people respect neither them nor their doctrines.'

It is regrettable that our Fathers in God should put themselves in the position in which they are liable to such criticism. Yet it is unhappily the case that bishops and clergy often set a bad example of lawlessness; and this seems to be particularly reprehensible when the legal rights of citizens are at stake, and not only their legal rights, but their moral claim to Christian consideration.

The terms of the Deceased Wife's Sister Act, 1907, and of the Deceased Brother's Widow Act, 1921, although not actually within the definition of the re-marriage of divorced persons, bring these marriages into our discussion at this point. But the full force of our conclusion does not apply to these marriages as it does to those of *divorcés*; because, while the marriages may

<sup>1</sup> These incidental observations are in exact accord with our contentions in Chapter III of this Section.

legally be celebrated in church, the obligation is not imposed upon the clergy as it is in the case of 'innocent' *divorcés*. Here the conditions are even less favourable than in the case of a 'guilty' *divorcé*; and the clergy are to be subject to no suit, penalty or censure for solemnizing or refusing to solemnize a marriage with a deceased wife's sister or with a deceased brother's widow. Therefore those who contract such marriages cannot claim, as of right, the services of the Established Church; but at the same time the clergy are free to solemnize such marriages if they have no scruple.

The same difficulty which may arise within the ecclesiastical sphere in the event of the readiness of the parochial clergy to solemnize marriages under either of these Acts, or, in the case of divorced persons, under the Judicature (Consolidation) Act, 1925, s. 184 (*supra*), has enjoyed illustration in the case of one of the first reported marriages under the Marriage (Prohibited Degrees of Affinity) Act, 1931.<sup>1</sup> This Act provides for marriage with a nephew or niece by marriage, with the same option to the clergy as in the Acts of 1907 and 1921. Within one month of the Act's receiving the Royal Assent, the marriage of a London solicitor with a niece by marriage—with a view to which the banns had been published on the requisite three Sundays—was refused almost at the last moment on the intervention of the Bishop then in charge of the Diocese of London.<sup>2</sup> The marriage was celebrated some time afterwards in a Register Office. In this case the incumbent of the parish church was willing to exercise his legal discretion to solemnize the marriage; but in spite of the provision of the principal Act that he should be subject to no suit, penalty or censure for solemnizing or refusing to solemnize it, he accepted the episcopal prohibition. The incidence of the law in this case is closely circumscribed. The only criticism is that the Bishop employed what can be no more than ecclesiastical discipline to override the rights of the incumbent under the Civil Law; and if the incumbent is agreeable to this intervention, he is free to accept it. But the Act clearly entitles him to proceed with the marriage. It might have seemed to be more considerate of the

<sup>1</sup> 20 & 21 Geo. V, c. 31, cited with the Acts of 1907 and 1921 as the Marriage (Prohibited Degrees of Affinity) Acts, 1907–1931, the Deceased Wife's Sister Act of 1907 being 'the principal Act.'

<sup>2</sup> *The Morning Post*, August 22, 1931.

Bishop if he had lodged his objection at an earlier stage than two days before the intended wedding day. The Bishop's explanation of his action was reported to have been that 'the Church does not recognize the new law,' a phrase which might open the question of the place of the Established Church in the English Constitution, but in present conditions has no legal meaning.<sup>1</sup>

Divorce Law Reformers are under a debt of gratitude to the late Lord Birkenhead for his great services to the cause of reform, both as Lord Chancellor in the House of Lords and otherwise, and we shall have quoted the authority of that great lawyer at several points in these pages. Now that he has passed from the scene of his mortal labours, it is no grateful task to question any pronouncement which he made; but since the present writer made this same point during his lifetime in the columns of the London Press (the *Evening Standard*, June 1925), it may be permitted to repeat it now. Lord Birkenhead had written three articles on the state of the Divorce Law and the need for its reform, which have now been reproduced in a long paper published in *Law, Life and Letters*.<sup>2</sup> His words in the newspaper are reproduced on page 196 of the book:

'If a member of the Church of England will not conform on the divorce issue, the Archbishops can, if they are so minded, compel him to forfeit communion with his Church. That again is right and reasonable.'

<sup>1</sup> It is an interesting commentary upon the attitude of the Church of England towards this phase of legislation from 'the principal Act' in 1907 to the latest Act in 1931, that while the marriage with a deceased wife's sister, etc., is matter of diriment impediment in the Roman Church, this is not apparently, in this particular case of marriage within the prohibited degrees, held to be an impediment of 'divine law,' necessary to the nature and institution of marriage. A papal dispensation to effect such a marriage appears to be possible. Pope Julius II gave such a dispensation for the marriage of Henry VIII with Catherine of Aragon (*vide* Book I, Chapter V, *supra*); and although the prevailing opinion of Catholic Europe was against its validity, the next Pope upheld the marriage. A modern Roman Catholic lawyer dismisses the notion that the impediment of affinity in the case of a deceased brother's wife is a matter of divine law, and would therefore hold it to be one which the Church could dispense (F. J. Sheed, *Nullity of Marriage*, p. 33). While some impediments are indispensable, some of those which concern the ability of the parties to marry, although these are diriment impediments, are yet dispensable, and among them are some of the prohibited degrees of affinity and consanguinity. Dr. Hensley Henson pointed out in 1907 that the Act of that year (7 Ed. VII, c. 47) was the equivalent of the papal dispensation—'Parliament has but exercised the dispensing power which the Pope has been exercising from time immemorial'—and, in the conditions of a reformed and established Church, Parliament had a better title so to dispense than any ecclesiastical authority (*vide The National Church*, p. 142).

<sup>2</sup> Vol. I, pp. 149-196.

As I wrote in 1925, 'Lord Birkenhead writes rather surprisingly,' and his 'statement invites discussion because such excluding action on the part of ecclesiastical authority is not provided for by the present law.' It is true that in practice, as we have seen, the clergy have been 'tuned' in a large measure both to refuse to re-marry *divorcés* and to repel them from the Communion; and to that extent it may be said that the forfeiture of communion with the Church has been indirectly enforced: indirectly, but illegally. For such refusal and repulsion are repudiated respectively by statute and by judicial pronouncement, and it is inconceivable that Lord Birkenhead could have contended that such ecclesiastical action has any legal justification. The statutory law provides for the marriage of *divorcés*; and since only 'open and notorious evil liver' may be repelled from the Communion, this repulsion cannot rightly be applied to persons who by the Law of the Realm are pronounced to be unmarried and free to marry again. The lesser excommunication, i.e. from the Communion, requires a declaration as provided in Canon 65 of 1603 before it can be enforced. Therefore the recommendation of Lambeth 1930 would amount to an incitement to the clergy to violate their own ecclesiastical canons, and involve a proposal that the Bishops shall prejudge the position of persons who can claim the due processes of ecclesiastical law with a right of appeal to the Civil Courts.

Yet even in their proposed repudiation of the Law of the Realm, the Bishops have not gone far enough to satisfy the straightest sect of the sacramentalists. For they were at once taken to task for even contemplating the right of a re-married innocent party to receive the Communion. On the sacramental theory the Communion is a greater sacrament than matrimony, and therefore to refuse re-marriage and yet to admit an innocent party to the Communion is to turn the sacramental principle upside down. The fully-fledged sacramentalist, faced with the choice of evils, presumably would prefer to receive a guilty *divorcé* for re-marriage rather than admit an innocent re-married *divorcé* to Communion. There is indeed more to be said for the actual amount of reason which underlies the sacramentalist's attitude than for the half-measure of Lambeth which can please none who think clearly.

On the sacramental theory the re-marriage of *divorcés* is adultery, because once married there can be no unmarrying on

any ground, except by a nullity which obliterates the marriage and says that it has never been. Otherwise, if it were not the sacramental theory, but the immorality of the *divorcé*, which promoted the objection to the re-marriage, the same objection would lie against the first marriage of many people whose claim is not questioned. Without any uncharitable reflection on an unfortunate and much maligned class, there can be no greater objection to the re-marriage of a *divorcé* than to the first marriage of a professional (or amateur) prostitute or of a man who has consistently cohabited with such a one before marriage. The clergy who refuse to re-marry the unfortunate *divorcé* readily marry many less deserving persons, because, conveniently enough, the sacramental principle applies to the one but not the other.

If on the sacramental principle refusal is to be the rule for all, innocent and guilty alike, on any other principle the rule would be the acceptance of all, innocent and guilty alike, or a complete discretion to accept or refuse on the merits of each case. The justification of this last course of freedom would be (1) that it is a matter of great difficulty to determine where the ultimate guilt or innocence really lie; (2) that in a great many examples there is no such discrepancy or legal antagonism as the Court has to suppose; and (3) that (a) it is frequently the case that where adultery is the ground of the petition, it has not actually been committed, or (b) if the adultery has been committed, it has not been anything in the nature of habitual vice, but only an act undertaken to satisfy the law which at present recognizes no other ground. That responsibility lies upon the Legislature which has not brought the English Law into conformity with human needs. It cannot be held to be just that the permanent stigma of moral guilt should be borne by a citizen who is driven, in some matrimonial exasperation, to adopt an expedient which he or she would not otherwise choose.

To the religious mind a moral justification for the re-marriage of *divorcés* may appear in the exemplary lives of persons who have been through the Court and have re-married. In many cases these are not people who are prone to sexual laxity, but simply such as have contracted unhappy marriages and have found the only way out. It is noticeable that *divorcés* after re-marriage often become conventional even to the point of dullness. This reaction is not the effect of penitence; it represents merely the normal

condition of people who, under the sting of unhappiness and disappointment, have been driven to an unwonted recklessness. It might be said that the Divorce Court is a promoter of propriety and dull respectability, and it is quite unfair that *divorcés* should generally and permanently be branded as adulterers.

There are, of course, some examples of divorce suits and *divorcés* where the more charitable consideration may not be fitting: cases of consistent and habitual adultery, with no excuse of matrimonial misalliance or misfortune, but deliberate and flagrant violations of the fundamental principles of human marriage and Christian love. The intention of the Act is that the Established Clergy shall not be compelled to marry those who are thus guilty; but perhaps it may be thought unlikely that such persons as we have supposed in this paragraph will present themselves for marriage in Church.

There is a case for the exercise of discretion by the clergy when they have personal or professional knowledge of the circumstances of *divorcés* who wish to avail themselves of their legal rights of re-marriage. And perhaps the only reform of the law which is to be suggested in this matter of re-marriage is the extension of a larger discretion to the clergy. This is not very seriously to be pressed, because whatever other reforms are urgent, the existing statutory rights of *divorcés* are satisfactory at this stage, except in so far as they are repudiated by most of the clergy. But in view of the frequent unreality of legal 'innocence' and 'guilt,' the extension of the discretion given to the clergy, to refuse re-marriage but not to refuse the use of the Parish Church, would hurt nobody: because those clergy who now refuse on principle include both innocent and guilty in their condemnation; and those who have considered the matter sufficiently to re-marry any person who has been through the Divorce Court will now know the difficulty of determining moral guilt and innocence with assurance. It is most important that no prohibition of re-marriage of either party in Church should be incorporated in any future Matrimonial Causes Act, or in any other Measure whatsoever; and it is greatly to be hoped that no politician will repeat Lord Buckmaster's too generous offer of concession to the Church in the debate on his Bill in 1920. He offered a clause prohibiting the clergy from re-marrying *divorcés* (i.e. 'guilty' parties, those who have been divorced, respondents

in a suit) during the lifetime of their former spouses. Although a previous episcopal proposal to prohibit the re-marriage of either party in Church had been defeated by one vote in Committee, Lord Buckmaster's concessional clause was adopted. Unhappily, on other counts the Bill went no farther, and the less ambitious Bill of the following year suffered the same fate. But in respect of the proposed prohibitive clause it is much to be desired that legislators shall realize that such a prohibition (1) is a very doubtful interpretation of Christian principle, (2) is quite arbitrary, and (3) in so far as it makes a distinction between innocent and guilty parties, on the point of prohibition as distinguished from discretion to the clergy, must needs be seen in the light of our study of 'Innocence, Guilt and "Camouflage,"'<sup>1</sup> frequently to involve a miscarriage of justice.<sup>2</sup>

The right of re-marriage ordinarily becomes matter of controversy only where the proposal is that it should be exercised in Church. It is not questioned in the office of the Registrar. Yet there are occasional examples in which the Registrar cannot function, and ecclesiastical authority can positively prohibit a marriage which the law allows, but for which, through lack of machinery, the State cannot provide. Such a case lately came to light. The husband brought a suit on the ground of the adultery of his wife. The co-respondent was in hospital, incurable and

<sup>1</sup> Book III, Section I, Chapter III.

<sup>2</sup> It is notable that a Commission of the Episcopal Church of America, after six years' study of the question of marriage and divorce, has recommended the establishment of an ecclesiastical marital court which, if adopted, would judge all cases of the proposed re-marriage of *divorcés* in Church. This recommendation has the obvious merit of departure from the doctrine of indissolubility, and sensibly excludes consideration of the distinction between innocent and guilty parties. The marital court would try each case on its merits with a single-minded concern for the welfare of the parties and the general benefit. The value and desirability of such a device must depend entirely on the attitude of the proposed court and its capability of unprejudiced judgement. The weakness of the proposal lies in the general unsuitability of the ecclesiastical mind for the exercise of judicial functions. N.B.—The more recent publication of the new Canon (No. 43) shows that although the said Episcopal Church has not adopted the liberal recommendation to entertain the re-marriage of both the innocent and guilty *divorcés*, it is prepared to receive the innocent party in approved cases (Section V); and it accepts the principle of admitting *divorcés* to Communion subject to reference to the Bishop (Section VII). It will be realized that in these ecclesiastical causes the rights of the individual are not secured by statute or judicial decision as in England; so that the American Church, being free to legislate, has shown a small measure of liberality.



immovable. The wife admitted unfaithfulness and volunteered the evidence. There was no appearance of collusion, and the Court granted the decree. There were 'special reasons' for accelerating the decree absolute in order that the respondent and co-respondent might marry. The presumption is that they were anxious that an otherwise illegitimate child might be born in lawful wedlock.<sup>1</sup> Since the co-respondent could not be moved from hospital, he could not be married either in Church or in a Registrar's Office. The only hope was a special licence, which can be issued only on the authority of the Archbishop of Canterbury. This licence was refused; and thus, if the presumed reason for the Court's accelerated action be the right one, the purpose of the Court was defeated.

As we noted in the chapter, 'The New Legislation,' all matrimonial causes were transferred from the Ecclesiastical Courts to the new Crown Court, with the exception of licences, which remain under ecclesiastical authority. For such purposes the State provides nothing comparable with the Archbishop's authority, in the way in which the Registrar's Office is comparable with the Parish Church; so that if an Archbishop and his advisors are of opinion that a case of hardship is so occasional that there is no need for its removal, they have the whip hand in defeating the ends of justice.

On this case the *Solicitors' Journal* (January 17, 1931)<sup>2</sup> writes:

'The situation is worth the attention of Parliament. No one but the Archbishop can grant a licence to marry in an unlicensed place, and, before he does so, he must have regard to the rules of the Church as he interprets them. Thus a marriage which may be desirable for every possible reason outside those rules cannot take place if one party or the other is too sick even to be carried to a registrar's office. The case suggests that some co-ordinate authority should have the power to grant such licence, perhaps the President of the Divorce Court in right of his matrimonial jurisdiction. Had he such power, it is obvious that he would grant a licence in a case where the whole machinery of his Court has been speeded up in contemplation of the early marriage of the respondent

<sup>1</sup> This would naturally be desirable, although under the Legitimacy Act, 1926, the important point is that the illegitimate child shall not be born while either the father or the mother is married to a third person, for the Act does not remove the bar sinister. For this reason no doubt the decree absolute was accelerated. The early decree would avert the absolute bar against legitimacy, but subsequent marriage would be necessary to legitimize the child.

<sup>2</sup> Vol. LXXV, No. 3, p. 34.

and co-respondent. In establishing civil marriage, the possibility of a case of this sort appears to have been overlooked.'

The remedy here proposed, whereby the requisite licence could be issued by the President alternatively to the Archbishop, would meet this exceptionally hard case.

But in general it may be urged that in any future reform of the Divorce Law, such as the Age demands, a comprehensive discretion to the clergy to re-marry or to refuse re-marriage in Church will protect the consciences of the clergy who regard the sacramental character of marriage as being terminated only by death. But to those other clergy who regard the sacramental character of each marriage as conditional on love and as ending through failure of love, this discretion will give liberty to offer their ministrations to those victims of matrimonial misfortune who ask for the blessing of the Christian Church on the success of a new marriage.

## CHAPTER VI

### THE SHAM OF SEPARATIONS

The new statutory provision of Judicial Separation in the Act of 1857 superseded the old divorce *a mensa et thora* of the Canon Law, and thus allowed to the word 'divorce' its true historical and legal sense of dissolution with the corollary of re-marriage. A decree of judicial separation, as we saw in the appropriate place, can be given by the Court in favour of either a husband or a wife on statutory grounds. These include adultery, cruelty and all grounds on which a decree could have been given in the old Ecclesiastical Courts, with the addition of desertion without cause for at least two years, and, after 1884, failure to comply with a decree for the restitution of conjugal rights. Here, in the course of time, the old disadvantage of women has been more than repaired. Judicial separations have been sought to a greater extent by women than by men. They serve the feminine possessive sense which, if it be disappointed by failure to keep a man's affection, prefers to prevent his possession by another woman.

Following these provisions for judicial separation was a series of enactments investing Courts of Summary Jurisdiction with power to give separation orders in certain cases of matrimonial disagreement, disturbance or danger. Under these Acts, now cited as the Summary Jurisdiction (Separation and Maintenance) Acts, 1895-1925, but actually beginning with the Matrimonial Causes Act of 1878, s. 4, the grounds for relief by Separation Orders have grown into a long list of seven grounds of relief for wives and two to husbands. The numerical advantage to women is considerable; but in either case, as we have seen, the effect may be to make the separation permanent. This result is not good for the petitioner who seeks it, and it is singularly hard on the respondent, who may suffer out of all proportion to his offence. This consequence may be pleasing to some severe moralists, but it is well that they should be reminded that the law administered in the Divorce Division is not the Criminal Law, although the inheritance of Canon Law principles has given to it all too much of that inappropriate colour.

Those who deplored what they regarded as the new departure

of the Legislature in 1857, in providing for a decree of dissolution on the ground of adultery, applauded as wise the statutory adoption of the principles and practice of the old Ecclesiastical Courts. To-day it is clear that most of the difficulties, complications and injustices of the law in Matrimonial Causes are directly due to that measure of miscalled wisdom. This is nowhere more apparent than in the operation of the judicial separation and the extended system under Summary Jurisdiction which followed from the bad old principle of combining separation of the spouses with the retention of the marriage tie. It has been a common habit to decry the attitude of the Bishops in the House of Lords towards the Matrimonial Causes Bill of 1857 on the ground of their opposition to the new and humane legislation. But the part played by a number of the Bishops was in fact creditable on the point of their support of the system of complete divorce, in place of separations. Of the old 'divorce' *a mensa et thoro*, which the Bill included in the new statutory form of the judicial separation, the Bishop of Exeter, Dr. Henry Philpotts, said that

'It was unknown by the Church of Christ at any period, except under the dominion of Rome; but they were now asked permanently to inflict the corrupt system of that Church upon the Church and the Nation of England.'

The case of *Dodd v. Dodd* in 1906<sup>2</sup> furnished a good example of the operation of this bad law. A drunken husband had failed to maintain his wife and children and thereby had driven his wife from home, when he would much have preferred to have kept her there in order to live upon her substance. She obtained an order containing the non-cohabitation clause, together with a provision that he should pay her 10s. a week, with which he never complied. This was in 1896. The wife, on discovering that her husband had committed adultery, petitioned for a dissolution on the ground of adultery and desertion. The allegation of desertion failed, in spite of the ample period of separation, because the non-cohabitation clause had terminated the desertion. Therefore

<sup>1</sup> Hansard, Vol. CXLVI, 3rd Series; see also Royal Commission, Minutes of Evidence, Vol. III, Q. 42,337 (Hansard, p. 1194, March 3, 1857). Cf. Bishop Cosin in the House of Lords' debate on the re-marriage of Lord Roos, 1669, quoted in the Duke of Norfolk's case, 1700; *vide* 13 St. Tr., p. 1332.

<sup>2</sup> [1906] P. 189; 75 L.J.P. 49.

the wife could obtain only a judicial separation on the ground of adultery, and was thus committed to a life of enforced isolation with no prospect of marriage during the lifetime of her separated husband. The particular disability in this case has been removed by the Act of 1923, by which adultery alone is adequate ground for a wife's petition. But in the absence of proved adultery the law still offers no relief save separation and celibacy. Therefore the remarks of the President (afterwards Lord Gorell) in *Dodd v. Dodd* remain as pertinent as when they were spoken. In a long judgement, which reviewed the legal history, he noted the condemnation of the 'remedy of permanent separations' in the *Reformatio Legum Ecclesiasticarum* in the reign of Edward VI. This Royal Commission, with Archbishop Cranmer as President, condemned the practice of permanent separation because it 'produced great scandal in the marriage state'; and Lord Gorell himself stated his conviction that 'permanent separation without divorce has a distinct tendency to encourage immorality,' and further expressed his doubt whether 'any reform will be effective and adequate which does not abolish permanent separation as distinguished from divorce, place the sexes on an equality as regards offence and relief, and permit a decree being obtained for such definite grave causes of offence as render future cohabitation impracticable and frustrate the objects of marriage.'

Of the reforms thus desiderated by the then President, who had unequalled opportunities of observing the evils which the law promoted, only one has been in any wise effected, viz., the equality of the sexes in petitions for dissolution on the ground of adultery. This, as we have seen, together with the new rules for Poor Persons' Causes, has given relief in some cases which otherwise would have repeated the sorry tragedy of *Dodd v. Dodd*. But the facility with which the provisions of the Summary Jurisdiction Acts offer an immediate but highly unsatisfactory relief continues to lure the poorer members of the community from seeking complete divorce. And in any event it is only on the ground of adultery, or its legal equivalent, that the new advantages can be pursued. On all legally lesser grounds than adultery, however serious be the matrimonial disagreement or disaster, permanent separation is the best which the law can offer. In the case of *Dodd v. Dodd*, as we have seen, the respondent's adultery was proved, but the Separation Order had terminated the desertion,

therefore the wife petitioner could obtain only a judicial separation. This defect has been rectified by the Act of 1923. But even if that Act had been in force the year before, it would not have rectified the defect in *Rutherford v. Rutherford (Richardson intervening)*.<sup>1</sup> This is another example of judicial separation as a second best, if not as a *damnosa hereditas*. The wife petitioner obtained a decree *nisi* against her husband, with whom cohabitation was dangerous to life and limb, on the ground of his alleged adultery with a named woman. This woman, however, intervened on Appeal with evidence against the possibility of the alleged adultery, and was successful. The decree *nisi* was rescinded, and the petitioner was granted only a judicial separation. Lord Birkenhead, giving judgement in the House of Lords, said: 'To some this may appear a harsh, and even an inhuman, result (viz., that the petitioner should be tied for life to a homicidal maniac); but such is the law of England. . . . It rests with Parliament (if and when it thinks proper) to end a state of things which, in a civilized community and in the name of morality, imposes such an intolerable hardship on innocent men and women.' Here, of course, the remedy lies in the extension of the grounds for divorce to include those causes of matrimonial misery which frequently are far more serious and disabling than adultery.

It is not, of course, suggested that every matrimonial upset should lead directly to divorce. Those who can afford to maintain two homes may temporarily separate; and in the case of poorer people there are conditions in which an application to a Court of Summary Jurisdiction may be the suitable course by which to obtain temporary protection. But if a Court's order fails as a temporary measure, and the conditions at the end of the period of the order show no relief from exasperation or danger, some more drastic remedy is needed, and one which does not condemn the applicant to lifelong celibacy.

At present the remedy is for the Court of Issue to prolong the order, or at best, or worst, for the applicant to petition for judicial separation on the ground of cruelty or desertion. This makes the separation permanent. But unless the order had the cohabitation clause inserted on the ground of cruelty, proof of the matrimonial offence of cruelty will be requisite; and in any event proof of desertion without cause for two years must be

<sup>1</sup> [1922] P. 144, C.A.; and [1923] A.C. 1 (H.L.).

furnished, for if the order contains the non-cohabitation clause it cancels desertion while it remains in force; for in spite of the provision of the Summary Jurisdiction (Married Women) Act, 1895, s. 5 (a), that the non-cohabitation clause 'while in force shall have the effect in all respects of a decree of judicial separation on the ground of cruelty,' it has been held by the Court of Appeal not to be sufficient evidence of the matrimonial offence of desertion.<sup>1</sup>

It is evident that the Summary Jurisdiction (Separation and Maintenance) Acts, 1895-1925, have led to immense complications which are not easy to unravel and reduce to clarity. This legislation has been designed to give relief, but has reached no more than a half-measure, accompanied by the abuses which commonly thrive in parasitic fashion on systems which are inadequate in conception and incompetent in execution. It may be hoped that at any rate the need will now be realized of further reform at once more drastic and more simple. At this point one signal defect in this particular legislation will have become clear, viz., the excessive powers which have been given to local courts. We have already referred, under 'The New Legislation,'<sup>2</sup> to the unwisdom of investing untrained Justices of the Peace with authority in cases which intimately concern the destinies of family life. The Country Bench is commonly occupied by persons who know nothing of the Law, but have acquired local prominence in quite other connections, and are in the hands of a local solicitor, who is Clerk to the Justices. Such a Court may be competent to try some trifling offences; yet even so it is regarded with a considerable measure of distrust. But when its jurisdiction in matrimonial causes carries the authority to make orders which, as at present, may have the effect of permanent separations, it is obvious that the power of such a Court is out of all proportion to its legal understanding. If the Attorney-General can even hint at the unsuitability of King's Bench Judges hearing matrimonial suits at Assizes, the argument applies *a fortiori* to a local jurisdiction which is empowered to give more than temporary protection in a domestic emergency. We have noted some of the mischiefs which may follow the orders given by Courts of Summary Jurisdiction. One of these has been reiterated in some pages past,

<sup>1</sup> *Harriman v. Harriman*, [1909] P. 123, C.A. at p. 143, *per* Fletcher Moulton, L.J.

<sup>2</sup> Book I, Chapter VI.

and is sufficient condemnation in itself. The Summary Jurisdiction (Separation and Maintenance) Acts provide, as we have seen, that a Separation and Maintenance Order, containing the non-cohabitation clause, has the effect, while in force, of a judicial separation on the ground of cruelty. But in a number of cases which have found their way to the High Court this non-cohabitation clause has been shown to be the wrong remedy. The non-cohabitation clause is to protect one spouse from the cruelty of the other. If the second spouse has deserted the first, there is no point in an order which exempts the first from cohabiting with the second. And not only is there no point in it, it is actually a disservice to the applicant for an order, because it terminates the desertion; so that unless the desertion has already at the time of the order run for at least two years, neither the desertion nor the order will be valid ground for subsequent proceedings. We have seen the disastrous effect of such an order in *Dodd v. Dodd* and shall return to it later. Now, since the Matrimonial Causes Act of 1923, if adultery were proved, the non-cohabitation order would not act as a bar to a dissolution; but although it would not bar a judicial separation on that ground, it would still bar a decree of judicial separation on the ground of desertion. The remedy would seem to be simple—to omit the non-cohabitation clause in an order given to an applicant who complains of desertion. The forms provided for the use of Courts of Summary Jurisdiction contain the non-cohabitation clause in print as a matter of course, and it is reported that, equally as a matter of course, the clause has not been struck out, as provided, where it is not only an inappropriate remedy but an active disadvantage.<sup>1</sup> The presence of this clause does not prevent a petition for dissolution, if there is evidence of adultery, or for judicial separation, either on the same evidence or on the ground of cruelty. But it bars, as ever, a decree of judicial separation on the ground of desertion, and plainly bars a suit for restitution of conjugal rights; and even if judicial separation is not a sound solution of a serious matrimonial problem, it is the solution which would otherwise be offered by the law, and therefore the insertion of a clause which would prevent it is an inexcusable blunder.

Granted that the applicant obtains an order for separation and

<sup>1</sup> *Dodd v. Dodd*, *supra*; *Sayers v. Sayers* (1929), 93 J.P. 72; *Jones v. Jones* (1929), 142 L.T. 167.



maintenance, or petitions successfully for a decree of judicial separation, opportunities of extortion by a refined form of blackmail are frequently available. It is usually women who seek separations; and since the law provides for their support at the cost of the husband when separated, there is every inducement to a dissatisfied wife to adopt this half-measure of separation, to reduce a husband to formal celibacy and to extort an income without fulfilling the terms of the matrimonial contract. Women have been known to prejudice their husbands' employers in such wise that husbands who have not responded to demands for more money have lost their employment. Further, when husbands have not been able to maintain the payments ordered by the Court, they have in the last resort been committed to prison under the Debtors Act, 1869, s. 5.<sup>1</sup> The maximum imprisonment for each offence is six weeks; but since the imprisonment does not extinguish the debt, the husband's position becomes worse. Thus, if a separated wife fails to get her maintenance, she can keep her husband almost permanently in prison, instead of allowing him to make a serious effort to recover his position.

Examples of these abuses are many; and although some of those cited in the Appendix to the Royal Commission's Report in 1912 would now be patient of alleviation under the Act of 1923 and the Rules for Poor Persons, it is doubtful how far some of the persons concerned would take advantage of these measures unless they received instruction in the procedure and encouragement to adopt it. It is true that many such people are crying for relief, but their habit is to go the way of least resistance, and a Court of Summary Jurisdiction seems easier to them than to take proceedings for divorce. An example of extreme injustice, involving the imprisonment and impoverishment of a husband who had a just grievance against his wife on account of a single man lodger, fills two pages of Mr. R. T. Gates's illuminating pamphlet, *Divorce or Separation—Which?*, published by the Divorce Law Reform Union in 1910 (pp. 14-16). The man was in and out of prison for months, and his arrears of maintenance at one time amounted to £150. This case is representative of many, and only differs from others cited in the prolongation and the perversity of the injustice. A recent example from the year 1930 shows that the evil has in no wise abated. The story is told in a letter, signed

<sup>1</sup> 32 & 33 Vict. c. 62.

by the man who suffered the injustices which are possible under the present Summary Jurisdiction (Separation and Maintenance) Acts, and published in *The Leaflet*, the monthly magazine of the Church of St. Ethelburga the Virgin, Bishopsgate, April 1931. The letter is as follows:

'I am a married man with two children, girl aged 13 and boy 10. After 14 years of married life incompatibility of temperament became so acute that my wife applied for a separation and maintenance order on the grounds of persistent cruelty, but failed (on the date July 29, 1930, at Grimsby County Sessional Division) because her case was not proved. On the next occasion, September 16, 1930, she obtained an order at the same Court for 25s. a week and the custody of the children, and my home was broken up and eventually I had to go into lodgings. I was unemployed when the order was made, and therefore soon got into arrears with payment, as my unemployment pay was 17s. for self, 9s. for wife and 2s. each for the two children, totalling 30s. a week.

'On November 10, 1930, my arrears reached £6 6s. 10d., and I was arrested and sent to Hull prison for one month. The folly and futility of this idiotic operation of the law is that I was deprived of the opportunity of working for my living, my wife and children became chargeable to the State, and I lost my right to unemployment benefit for four weeks, totalling £6, almost the amount I went to prison for. If there is any sanity in such procedure I should like to know where it is or in what way the State or the individual is benefited by such action. Besides the agony of matrimonial unhappiness the prison experience is more likely to embitter a man and set his thoughts in a wrong direction. I believe the strain has affected my heart and I would do anything to ameliorate the prisoners' condition. I am 42, healthy and intelligent, and if I require a mate cannot get a divorce unless I commit adultery, which is utterly against my principles. Surely if separation lasts over three years, divorce should follow as a matter of course as in Scotland,<sup>1</sup> as it is in the interests of the State to have happy contented citizens. The marriage laws of this country are obsolete.'

The writer here proposes a remedy which would go some way to the correction of the evil. But it is suggested that an extension of the grounds for divorce would permit of divorce proceedings *ab initio* in place of any separation order; and that if a separation order is in the first instance preferred and obtained, then the order should be converted into a decree of dissolution after the proposed three years, or whatever period may be enacted by statute on the principle of establishing an adequate test of the

<sup>1</sup> N.B.—The period of desertion which is ground for divorce in Scotland is four years.

completeness of the matrimonial cleavage. As a measure *ad interim*, in the absence of the extension of grounds for a decree of dissolution, it would be a sound provision that the dissolution should follow after the same period in cases where the requisite evidence of adultery was available.

The Majority Report of the Royal Commission recommended that, when a separation is applied for on grounds which would justify a decree of divorce, the Court should have discretion to give a decree of divorce on the application of the respondent.<sup>1</sup> This would not meet the cases considered above, but it would give the requisite relief in others to which we shall now turn. For under the present law, even if a husband is guilty of adultery, a wife may prefer, as we have already noted, to adopt the policy of separation, or perhaps to petition for judicial separation, which means that the separation is permanent within the marriage bond, in spite of the possibility of relief by divorce which is now available on that ground. The old contention that in the sphere of marriage and divorce there is one law for the rich and another for the poor, on account of the prohibitive cost of divorce proceedings for the poor, has been met in form by the new Rules for the hearing of Poor Persons' Causes—in form, but frequently not in fact, because all but the very poorest are excluded from the advantages which the Rules offer; and in any event free divorce proceedings do not provide for the most expensive item, viz., the search for a missing spouse. It remains very largely the case that those who, by reason of their poverty, could take advantage of the Rules to petition for divorce are such as are content to adopt the easy course of a separation order; and that many who would wish for complete divorce are still deterred by the cost. Moreover, there are women who under the profession of religious scruples refuse to petition for the divorce, which in their position would be possible, and choose vindictively a judicial separation, unless or until it is made financially worth their while to amend the petition to one for divorce.

The difficulty of obtaining a divorce in some cases of matri-

<sup>1</sup> This proposal, of course, would depend upon the Commission's previous recommendation that if a permanent order is necessary it should be referred to the High Court, and that Courts of Summary Jurisdiction should not be empowered to give separation orders for more than two years from the date of the original order.

monial tangle, where no true marriage exists, in spite of the marriage bond, is, of course, equalled by the facility with which it can be secured when husband and wife both want it, and are well instructed by their solicitors. The requisite evidence and the absence, or careful concealment, of all suspicion of collusion or other bars, if any, will secure a dissolution without difficulty. But the complications which prevent a suit, where one party wants a divorce and the other is too sharp to be cited as a respondent and also refuses to use the evidence provided by the other, are accentuated by the possibilities of a judicial separation. A, a husband, knows that B, his wife, is no true mate, but cannot find evidence on which to found a petition for dissolution. While B lives on A's substance and enjoys illicit associations quietly conducted out of sight, A would be glad to make an end of the farce and marry a more promising partner. Despairing of ever catching B, A offers B evidence on which B can petition. B accepts the gift of evidence and petitions not for dissolution, but for judicial separation. B thereby is permanently separated from A, derives an income for her maintenance from A, is free to continue in her secret attachments without further possible domestic embarrassment,<sup>1</sup> and has the vindictive satisfaction of preventing A from finding another wife.

Or the case may begin otherwise and lead to the same result. As we have noted, the judicial separation is chiefly made use of by women. A man marries perhaps not wisely but in full sincerity and with every intent to do his duty and to make the marriage a success. He has good prospects as a young man, is caught by his future wife's family and led into marriage with a quite unsuitable and unresponsive young woman with no gifts for her part in life. In all other affairs of life, if men and women make mistakes, they have the freedom, if not the opportunity, to change their tactics and to make a fresh start. In marriage alone they are committed to the course which they have chosen, unless in particular conditions they can escape it through a scandal. It may be that the wife makes the husband's life intolerable, with the result that he has no alternative but to leave her. This is actual desertion, although with adequate evidence the husband could sometimes

<sup>1</sup> If to the petition for judicial separation A alleged conduct conducing in answer, then B's maintenance might be conditioned *dum casta*; but B may escape detection.

satisfy the Court that the wife was the technical deserter.<sup>1</sup> But in the absence of such evidence, the husband may find himself the object of a decree for restitution of conjugal rights; and if he fails to comply, he renders himself liable to a decree of judicial separation on the ground of desertion. Such is statutory desertion under the Matrimonial Causes Act of 1884, s. 5, whereby the decree dispenses with the period of two years. By this decree the wife, who is ultimately the guilty party, obtains maintenance from her separated husband, who is on all counts the innocent and the injured party. This is the most that the wife can do on the ground of desertion. But having effected the separation, it is not improbable that she will be able to obtain further evidence against the husband. Enforced celibacy may be highly uncongenial to him, and if his wife obtains evidence of his adultery she can divorce him. He is technically guilty, but the initial cause of the trouble lay with her. It would, of course, be kind of her to give him his freedom; but this is another example of the fact that two matrimonial offences, if one be adultery, are sometimes beneficial to the offender. For in such a case, although the matrimonial upset was no fault of the man's, the man would in some sense be fortunate to escape from the alliance. Or, a husband discovered his error through the unfortunate experience of a marriage which, in spite of his efforts to be considerate, remained unhappy. He may then fall into some informal attachment which will become known to his wife, and so furnish adequate ground for a suit for a dissolution—but ground which may be used to quite another end, i.e. permanent separation.

In his great speech in the House of Lords in 1920 Lord Birkenhead contrasted the case of the rich woman, who has all the machinery and resources of the law at her disposal, with that of the poor woman, who cannot trace a missing husband. But we have here to consider the case of a rich woman who, having the said resources of the law at her disposal, chooses to use them not to set an end to the legal tie which holds together an ill-mated pair whose marriage has morally ceased to be, but chooses to use these resources in order to maintain the tie of legal marriage, and yet to repudiate her husband, to set him permanently at a distance and to extort from him an income to keep her in comfort or to add to her own resources. Such is the 'value' of a judicial

<sup>1</sup> *Pulford v. Pulford*, [1923] P. 18.

separation, a value difficult to appraise except as the ignoble satisfaction of base motives.

A recent case occupied half a column of *The Times* on June 25, 1930. A wife petitioner prayed for a judicial separation on the ground of the respondent's adultery. The respondent contended that the petition for judicial separation, instead of dissolution, was purely vindictive. The Judge, Hill, J., questioned the petitioner in order to discover the motive for such a petition, when the same evidence would have justified a petition for dissolution. The ground given was that of religious scruple, and this led to considerable altercation between the Judge and the petitioner's Counsel. Subject to adequate proof of the alleged offence, the law provides in such a case for a decree which would give the woman the spurious satisfaction of remaining married to a man whom she need never see, and would condemn the husband to an unnatural celibacy during the life-time of the wife. Happily in this case the Judge was not satisfied, and ordered an adjournment for the amendment of the petition to include the name, if ascertainable, of the respondent woman; and expressed the hope that the petitioner would reconsider the petition, because, even if she had scruples about re-marrying after dissolution, it would be of benefit to nobody that she should bind her husband in the same way.<sup>1</sup> In such cases the clear course of reform of the law is the abolition of permanent separations, either by the removal of judicial separations as a relief or by their conversion into dissolution after, say, three years. A petitioner with religious scruples would then have the option of taking no legal action, or of adopting a course which either at once, or after three years of separation, would legally terminate the marriage.

On the ecclesiastical theory of indissolubility, of course, a decree of dissolution by a State Court does not in fact unmarry the parties, and therefore gives no permission to re-marry; for on that theory dissolution cannot take place except through death. A petitioner possessing these scruples is under no obligation to be re-married. But there is no reasonable ground on which this petitioner can prevent the respondent, who has no such scruples, from the re-marriage which the Civil Law allows; for the alternative to re-marriage might be a life of illicit relations which on the

<sup>1</sup> The petition was afterwards amended, and the decree of dissolution has since been made absolute, the total cost to the respondent being some £600.

ecclesiastical theory would be adultery, no less than it would be in the case of a person who is judicially separated. But on the ecclesiastical supposition re-marriage during the life-time of the other party is also adultery, because the first marriage is terminable only by death, unless it has been totally obliterated by annulment. The answer therefore is that if the Court's decree of dissolution does not terminate the marriage, the alternative, to which the scrupulous spouse who elects to petition for separation runs the risk of committing the offending partner, would be on a footing of equal depravity, i.e. to live in adultery while remaining married. The opposition to all divorce *a vinculo* is intelligible on the Catholick hypothesis; but in a country which admits the principle of divorce it is irrational and inequitable that the legal system should provide an alternative decree which, in deference to ecclesiastical scruple, will deprive a citizen who does not subscribe to that scruple of the right of freedom which the law itself allows and contemplates.

But the case against permanent separations rests on larger grounds than this objection to the substitution of a petition for the lesser decree for that of complete dissolution, when adultery is the ground. At present the grounds of cruelty and desertion admit of nothing more final than this permanent separation within the marriage tie. However favourably placed a spouse may be for commanding the resources of the law, neither cruelty nor desertion will avail to end a marriage unless there is proof of adultery. But cruelty and desertion as understood in Matrimonial Causes are as good indication of matrimonial failure as is adultery. Indeed they may be much more effective than the single act of adultery, which legally justifies a decree of dissolution.

The flood of marriages which was a by-product of the late War produced a flood of divorces. Hasty marriages in a time of stress and impatience led to early disillusionment; but that disillusionment was very far from always ending in divorce. Frequently and unhappily it came in the process of desertion, sometimes without doubt accompanied by adultery, but in such wise that the women, who had given themselves to soldier husbands, had no means of tracing the deserters and running them to ground. Had they been able to prove adultery in the legal process, the Court would have given relief. But such a course was generally impossible. For such undoubted desertion, as when the husband

migrated to one of the Dominions, the law could give the wife no more than a separation order, which, if it contained a non-cohabitation clause, would at once terminate the desertion; and at best it would give the woman the rightful custody of the children of the marriage. But where would be the woman's source of livelihood? How could she live? The order could provide for maintenance; but how could it be enforced if the husband were in the Antipodes, or China, or Peru? The woman would be stranded with no resources, and, perhaps, with children to maintain. In such a case there might be a man who would be willing to marry her. But even after seven years' desertion the woman would marry at the risk of an indictment for bigamy in the event of the first husband reappearing,<sup>1</sup> and the second marriage would then be void.<sup>2</sup> Yet all that the law will offer to a woman so placed and subject to such risks is this separation order, which brings no money from the deserter and plainly puts a premium on prostitution. Even a judicial separation would not alleviate the woman's trouble, but would only render the separation permanent. Such is the futility and the mischief of judicial separation—or of any separation which is either permanent or even more than a temporary measure of protection—which leaves the parties, in Lord Stowell's phrase, 'in the undefined and dangerous characters of a wife without a husband, and a husband without a wife.' 'This proceeding,' in the language of Mr. Bishop (quoted in the Majority Report, p. 91 f.), 'neither dissolving the marriage nor reconciling the parties, nor yet changing their natures . . . is, while destitute of justice, one of the most corrupting devices ever imposed by serious natures on blindness and credulity. It was tolerated only because men believed, as part of their religion, that

<sup>1</sup> Offences against the Person Act, 1861 (24 & 25 Vict. c. 100), s. 57. N.B.—The deserted party would be acquitted if the seven years' desertion were proved, unless it were proved by the prosecution that she knew that her husband was alive during the seven years (*R. v. Cullen*, 9 C. & P. 681; *R. v. Curgerwen*, 35 L.J., M.C., 58).

<sup>2</sup> The Majority Report of the Royal Commission recommended in 1912 that after seven years' absence the presumption should be in favour of the death of the absentee, and that the party so deserted should be enabled to obtain an order for presumption of death, which order, having been made absolute after six months, would entitle the deserted party to contract a valid marriage—a similar order to be obtainable with reference to no period of years, but on satisfactory evidence of belief that the absentee is dead when the fact of death cannot be ascertained.

NOTE.—The Minority Report concurred in this proposal.



dissolution would be an offence against God, whence the slope was easy towards any compromise with good sense; and as the fruit of compromise we have this ill-begotten monster of divorce *a mensa et thoro*, made up of pious doctrine and worldly stupidity.'

The mischief and the hardship of separation are evident enough from a few examples, even when stated coldly and without the harrowing details which are available among the archives of reforming societies. Such mischief and hardship are not worse when they affect large numbers of the population than when they affect only a few. They are morally to be condemned if they mar the life of but one unhappy spouse. But when these evils have overtaken not a few but multitudes, they become not only morally indefensible but actively subversive of public confidence and dangerous to the stability of society. The number of separations by deed, by order of Courts of Summary Jurisdiction and by decree of judicial separation, run into thousands every year; so that at any given time it is computed that there will be probably no less than half a million married people in this country separated from their spouses, yet barred from sexual relations except in illicit association. The need for relief from this every-wise unnatural state is largely inarticulate, for the folk who feel the pinch are for the most part in a depressed position. But it feeds the fires of dissatisfaction and revolt, and leads, while it remains unredressed, to a continuing and growing indulgence in lawless life which defies the authority of Church and State, to the detriment of both. The Church officially shows no favour to reform; and the State will remedy the glaring anomalies and injustices only when the demand for its action gains sufficiently vigorous and representative expression.

## CHAPTER VII

### DIFFICULTIES OF DOMICIL

#### (i) DOMICIL AS A TEST OF JURISDICTION

In the Section which treats of the Bars to Relief<sup>1</sup> we have noted the effect of lack of domicile. In a suit for dissolution the Court has no jurisdiction unless the parties are domiciled in England at the institution of the proceedings; and although in a suit for nullity easier tests have been sufficient, domicile being only one of these possible tests, a recent decision excluded the other tests of jurisdiction in a suit for nullity on the ground of incapacity, and dismissed the petition for lack of domicile and consequent lack of jurisdiction. Domicile has long been a factor in reform on account of the difficulty which it presents in cases of dissolution. Since the judgement in *Inverclyde (otherwise Tripp) v. Inverclyde*,<sup>2</sup> it now presents a new difficulty in cases of nullity where the marriage is voidable.

Domicile may be (1) that of origin, i.e. the domicile which a person acquires at birth; or (2) it may be that of choice, i.e. a domicile newly created by a person's change of residence, coupled with intention there to continue to reside, such as to oust the domicile of origin. This new domicile may, however, be doubtful to the end of a person's life. We have noted the case of *Bell v. Kennedy*,<sup>3</sup> where the House of Lords was not convinced of the Scottish domicile of one whose domicile of origin was Jamaica, but who left that island permanently and had resided for a year in Scotland. Again, when an American had lived in the British Isles from 1859 to 1897, but varied his residence by long visits to the Continent, the House of Lords held that he was domiciled in the United States of America.<sup>4</sup> Here residence was broken, and there was insufficient evidence of intention. Or again, (3) domicile may be acquired by law, as when a woman marries and acquires her husband's domicile. If the husband's domicile were foreign, his wife could acquire by marriage his foreign domicile;<sup>5</sup> and, as against

<sup>1</sup> Book II, Section II, Chapters II and III (i).

<sup>2</sup> [1931] P. 29; 47 T.L.R. 140.

<sup>3</sup> (1868), L.R. 1 Sc. App. 319.

<sup>4</sup> *Winans v. Attorney-General*, [1904] A.C. 287.

<sup>5</sup> *In re Daly's Settlement* (1858), 25 Beav. 456; 27 L.J. (C.H.) 751; *Harvey (otherwise Farnie) v. Farnie* (1882), 8 App. Cas. 43; 52 L.J. (P.) 33; *Turner*

his domicil of origin, his, and therefore her, domicil in England would require strong proof not only of residence in England but of established intention there to reside. If, however, the husband's domicil were English, his wife, if her domicil had been foreign, would acquire his English domicil on her marriage. Domicil, as we have seen, applies individually to each country or territorial unit; even Scotland and Ireland, as well as all British Dominions beyond the seas, being foreign from the point of view of English domicil.<sup>1</sup>

## (ii) IN SUITS FOR NULLITY

The jurisdiction of the Court to hear a suit for nullity has hitherto been given (1) if the parties were married in England, regardless of their domicil or residence; or (2) if the marriage took place abroad, provided that either the respondent is resident in England, or both parties are domiciled in England, at the commencement of the suit. But, as we have seen in the course of consideration of this question, the recent judicial decision in *Inverclyde (otherwise Tripp) v. Inverclyde*<sup>2</sup> has shown that even when the marriage took place in England, the Court cannot entertain a suit for nullity on the ground of incapacity unless the parties are domiciled in England. The Court in this case distinguished between voidable marriages and marriages which are void on other grounds than incapacity; but in the previous case of *Salvesen v. Administrator of Austrian Property*,<sup>3</sup> the Court regarded a decree of nullity on the ground of irregularity in the celebration of the marriage, which was pronounced by the Court of domicil, as a judgement *in rem* affecting status and binding on all the world; and *dicta* in that case implied that only the Court of domicil could invest the decree of nullity with that validity. The decision in the one case and the *dicta* in the other appear to imply a radical departure from the old conception of nullity and from the procedure adopted in the Ecclesiastical Courts, although no precedent for a suit on the ground of incapacity otherwise analogous to *Inverclyde's* case could be found. Since, however,

(*falsely called Thompson*) *v. Thompson* (1888), 13 P.D. 37; *Burton v. Burton* (1873), 21 W.R. 648.

<sup>1</sup> *Attorney-General for Alberta v. Cook*, [1926] A.C. 444.

<sup>2</sup> [1931] P. 29; 47 T.L.R. 140.

<sup>3</sup> [1927] A.C. 641; 43 T.L.R. 609.

the effect is to introduce a new bar to suits for nullity, any proposal for the reform of the Law in Matrimonial Causes must take account of it. There is on moral grounds considerable objection to, and distrust of, annulments of marriage, in view of certain published decrees of the Roman Rota in recent years; and the Court's tendency to assimilate suits for nullity to suits for dissolution may seem to be on that count sound. But the Court's ostensible reason is that, pending proof of impotence, a marriage, although voidable, is not invalid, and that therefore a decree of nullity on that ground, if on none other, effects a change of status. The reason is intelligible, although the procedure does not appear to conform to that of the Ecclesiastical Courts from which this cause was inherited. For domicile was not an essential test of jurisdiction in nullity suits, but was necessary only in lieu of simpler tests. A decree of nullity is a declaration that there has never been a marriage between the parties, and that the supposed marriage is null and void *ab initio*. If the marriage is thus pronounced null and void, it is not easy to maintain that the decree effects any change in the status of the parties who by the decree are shown never to have been married. Therefore domicile has not been held to be necessary in order to give jurisdiction to the Court to hear a suit for nullity, as it is necessary in cases of dissolution of marriage whereby married persons lose the married status. The importation of domicile as a test of jurisdiction in a suit for nullity on the ground of incapacity, i.e. when the marriage is not void but voidable, raises a question of historical importance and presents a possible problem in legal reform.

It is submitted that historically the distinction between void and voidable marriage is a distinction rather of procedure than of principle. A void marriage is void as a fact, and does not necessarily need a decree of the Court to pronounce it void. A marriage voidable on the ground of physical incapacity requires proof of incapacity and a decree of nullity to render it void; but once pronounced void by the decree, it becomes void *ab initio*,<sup>1</sup> which means that the parties were never in fact married, and the effect of the decree of nullity cannot be a change of status, because never having been married the parties never had in fact any married status. To admit this view of nullity in the case of a voidable marriage is to realize the measure of the tendency to

<sup>1</sup> *P. v. P.*, [1916] 2 I.R. 400 C.A.

render relief difficult, which has been exemplified in the recent decision.<sup>1</sup> For here a nullity suit on the ground of incapacity was dismissed, after trial of the issue of jurisdiction, which was not admitted owing to lack of domicile, and the case was therefore treated virtually as a suit for dissolution.

On the principles of the Canon Law, which provided for nullity where divorce was limited to separation without re-marriage, the distinction between voidable marriages and marriages which require a suit for divorce is clear; and the statutory introduction of a ground for dissolution has not altered that principle. Nullity is given as relief on the ground (*inter alia*) of the incapacity of one of the parties; divorce is given on the ground of the fault of one of the parties. If, then, this distinction is admitted, a suit for nullity on the ground of impotence implies, not that a consummated marriage has broken down after a trial, but that the petitioner was never able to enjoy what, according to the conception of marriage under the law, is a fundamental condition of marriage. Therefore a decision which has the effect of treating a suit for nullity on this ground as a suit for dissolution has virtually the effect of setting a new bar to relief, and in some cases must be seen to work great mischief. It will mean that if an English woman resident in England were to marry a foreigner with a foreign domicile and find him to be impotent, she would be barred from suing for nullity except in the Court of her husband's foreign domicile.<sup>2</sup>

The point is plain. Stated in its naked simplicity, it amounts to this; that although a woman is not married, as the decree of

<sup>1</sup> *Inverclyde (otherwise Tripp) v. Inverclyde (supra)*.

<sup>2</sup> I welcome the *gravamen* that such a case as this, i.e. the discovery that a foreign husband is impotent, is not harder for the English wife than if the foreign husband turns out to be a rake, in which last case the English Court can give no relief. Perhaps, in fact, one case is not harder than the other, even though the principle which governed the Ecclesiastical Courts made the profound distinction that impotence was a defect which frustrated the primary purpose of marriage in such wise as to justify the annulment of a marriage, whereas adultery was an offence which had not prevented copula, and admitted only of permanent separation without the right of re-marriage. Without subscribing to this Canon Law doctrine of indissolubility, we should incline to admit the distinction in principle between the defect and the offence, but should find the principal objection against the recent judgement to lie on the ground that the law has added a new bar to relief. This step was, of course, in the interest of the greater uniformity of English Law, but seems to show an accentuated disregard of the foreign practice of recognizing residence.

nullity would show, yet she may find it certainly difficult, probably precarious, and perhaps impossible, to discharge herself of a status which in the event of a decree she will be seen never to have held. At the risk of some repetition of the history recorded under the Canon Law,<sup>1</sup> it is perhaps desirable at this stage to return to it for the purpose of full argument. The English Courts have inherited the practice of the Ecclesiastical Courts which administered the Canon Law. The Canon Law insisted on the copula, or consummation of marriage, in addition to consent or verbal contract, as the test of the validity of marriage. It is true that under the Roman Civil Law the only persons who were incapable of marriage on the ground of incapacity were those who had been incapacitated by surgical operation (*castrati*).<sup>2</sup> But under that law divorce came to the rescue of such as found their marriages frustrated by incapacity. When the earlier Christian Emperors had modified the practice of divorce by mutual consent by the introduction of definite grounds, Justinian added impotence as a ground;<sup>3</sup> but in his 22nd Novel (c. 6) he required that the impotence should have been consistent for three years from marriage, in order to justify divorce. It is plain that if consummation is necessary to the complete celebration of marriage, marriage becomes valid so soon as consummation has taken place, whether that be on the marriage night, or after two, or three, or more years. It may seem to be an arbitrary period on which to fix, but if divorce is to be restricted, and the copula is held, as it became in Christian times, an essential to marriage, it is requisite that an adequate test should be applied in order to support the allegation of the party who finds that the marriage is, or will be, physically unproductive. But in fact, in Christian times, or at least when the Canon Law view replaced that of the Civil Law, the release from marriage on this ground was not strictly divorce at all. If marriage were held to be incomplete without the copula, or consummation, an unconsummated marriage was no marriage, and was essentially null. Therefore the Canon Law went further than this half-measure of Justinian, and held that until consummation had been effected marriage was incomplete; at that stage there was *conjugium initiatum*, but not *conjugium ratum*. Therefore it was not a case for divorce, but for nullity.<sup>4</sup> Thus, referring to

<sup>1</sup> Book I, Chapter IV.    <sup>2</sup> *Digest*, XXIII, 3, 39.    <sup>3</sup> *Vide* Book I, Chapter III.

<sup>4</sup> Under the later Canon Law, while *conjugium ratum* could rightly describe

divorce *a mensa et thoro*, Gratian expresses this principle in the *Decretum*,<sup>1</sup> viz., that there can be no 'divorce' in the case of an unconsummated marriage, because the marriage is null from the first. Even Alexander III, who attempted towards the end of the 12th century to give effect to his decision that marriages verbally ratified were indissoluble even without consummation, yielded in practice to the pressure of custom under which unconsummated marriages on the ground of impotence were null. Although the Penitential of Theodore in England in the 7th century allowed divorce with re-marriage on the ground of incapacity which occurred after copula, this concession did not survive the introduction of the Canon Law; and thereafter the general practice in this country was that of the Western Church. Marriage was null on the ground of 'impuberty, malformation or frigidity; where marriage itself was void *ab initio* and the sentence of divorce merely declaratory of its being so.'<sup>2</sup> In spite of this misleading use of the word divorce—which, as we have seen, was freely employed under the Canon Law to signify both annulment and separation *a mensa et thoro*, when its true form *a vinculo matrimonii* was disallowed—the principle is clearly established that a nullity pronounced on the ground of impotence was distinct from the dissolution of a valid marriage. It will be noted that although on the grounds of 'impuberty, malformation or frigidity' marriage is described by the authority quoted as void *ab initio*, it is in the nature of the case a voidable marriage, requiring a decree of 'divorce' (*sic, lege annulment*) to declare it void. When a voidable marriage becomes void by decree, the effect is *ab initio*; but the marriage holds until the decree of nullity is pronounced. But a void marriage does not necessarily require a decree in order to pronounce it so. Although a decree is desirable for purposes of satisfactory proof and record, the marriage is, as a fact, void on the grounds given in the chapter on 'The New Legislation'.<sup>3</sup> Thus, when the Canon Law doctrine

a marriage initially valid and consummated, the word *ratum* also described a valid marriage which had not been consummated when there was no allegation of impotence. This marriage, *conjugium ratum sed non consummatum*, became the subject not of annulment but of dissolution.

<sup>1</sup> C. 27, q. 2, c. 34 *dicta*, to which we have already referred under 'The Canon Law' (Book I, Chapter IV); and C. 33, q. 1.

<sup>2</sup> *Vide* Burn's *Ecclesiastical Law*, Vol. II, p. 500.

<sup>3</sup> Book I, Chapter VI (omitting impotence and alleged but uncertified insanity from those grounds).

maintains, as in history so in the Roman Church to-day,<sup>1</sup> that marriage, when ratified verbally and consummated, is one and indissoluble except by the death of one or other of the parties, this does not exclude the annulment of a marriage, of which, in spite of subsequent consummation, the verbal ratification was invalid.<sup>2</sup> For so it might be on the ground of one of the impediments which properly prohibit a marriage and render it null and void *ab initio*, even in the absence of a decree of nullity; as, for example, consanguinity, bigamy, force or fraud which exclude consent, or irregularity in the celebration of the marriage. There is thus a clear distinction between such void marriages as we have just indicated and those voidable marriages which always require a decree to render them void. There is clearly a further distinction between each of these and actual divorce on whatever ground, for a divorce has not the effect of pronouncing a marriage null and void. It dissolves the marriage<sup>3</sup> and sets the parties free to marry again; but it does not declare that the marriage had never been a valid marriage. A void marriage is obviously not a marriage. If the parties have not in fact been married, owing to the existence of a sufficient impediment, they can suffer no change of status. A voidable marriage is accounted marriage pending a decree, but a decree of nullity renders it void *ab initio*. Thus it might seem that the change of status from celibacy to the married state and the change effected by decree of nullity are both fictitious. But dissolution by divorce actually unmarries the parties to a valid marriage, and clearly involves a change of status.

In *Inverclyde v. Inverclyde* (*supra*) both Counsel for the respondent in his argument and the Judge in giving judgement maintained the distinction between void and voidable marriages to the extent of virtually eliminating the other distinction (i.e.

<sup>1</sup> It should be added that Baptism is one of the constituents of indissoluble marriage in the Roman Church; and that lack of consummation, not owing to impotence, is not a ground for nullity either in the Roman Church or by English Law; but that while non-consummation is ground neither for nullity nor for dissolution in English Law, it is ground for dissolution in the Roman Church. For an up-to-date statement of the present practice of the Roman Church, *vide Nullity of Marriage*, a most valuable little book by Mr. F. J. Sheed.

<sup>2</sup> E.g. through lack of consent. Witness the now famous Marlborough case of 1926, where the so-called wife had been driven into 'marriage' by *vis et metus*, and had therefore not given her verbal ratification freely.

<sup>3</sup> Or, more strictly, gives legal effect to the moral dissolution which has already taken place.



between voidable marriages and marriages dissolved by divorce), except as a matter of form. Mr. Norman Birkett, K.C., for the respondent, in reply to the argument of the petitioner's Counsel, referred to the transformation which had been effected by the decision and *dicta* in *Salvesen's* case. He insisted that the statutory direction that 'the Court must conform to the old procedure "as nearly as may be" could not be held to restrain the living growth of English Law,' and that just as the decision in *Le Mesurier v. Le Mesurier* ([1895] A.C. 517) laid it down finally that domicile was the test of jurisdiction in suits for dissolution, so 'the law of jurisdiction in nullity could be regarded as progressive,' and 'where status was alterable, the law of the domicile must apply.'<sup>1</sup>

The Judge, agreeing with the respondent's Counsel, said:<sup>2</sup>

'The marriage being voidable not void, and the decree affecting and involving an alteration of status, and being a judgement *in rem* binding on all the world, there can be no jurisdiction in this Court unless the parties are domiciled in this country. It seems to me that if the principle that jurisdiction depends on domicile in a suit for dissolution of marriage by divorce is sound, it must equally so depend in a suit for dissolution of marriage for impotence. To call it a suit for nullity does not alter its essential and real character, namely, a suit for dissolution. It is a mere difference in form.'

The change from the practice of the inherited law, which is here apparent in the view taken by the Court, had been more than anticipated in *Salvesen's* case (*supra*), which enjoyed considerable quotation in *Inverclyde's* (*supra*).

There, as we have seen, a foreign decree of nullity—not on the ground of impotence, and not a voidable marriage, but on the ground of lack of due formality, and therefore a marriage void *ab initio*—was held to be a judgement *in rem* altering the status of the parties. The effect of this was, therefore, held to be that of a dissolution by divorce. From the speeches of the Law Lords, quoted by Bateson, J., in his judgement, it will suffice at this point to reproduce his quotation from Lord Dunedin (47 T.L.R., at p. 143):<sup>3</sup>

<sup>1</sup> 47 T.L.R., p. 140, at p. 142.

<sup>2</sup> [1931] P. 29, at p. 41; 47 T.L.R., p. 140, at p. 143.

<sup>3</sup> [1927] A.C. 641, at pp. 661–664; 43 T.L.R., at p. 614; the full speech of Lord Dunedin, who was disposed to question the *dicta* in *Ogden v. Ogden* ([1908] P. 46) on this point.

'They (the judges) say that in an action for divorce you have to do with a *res*, to wit, the status of marriage, but that in an action for nullity there is no status of marriage to be dealt with, and therefore no *res*. Now it seems to me that celibacy is just as much a status as marriage. . . . The judgement in a nullity case decrees either a status of marriage or a status of celibacy. . . . I am, therefore, of opinion that a decree of nullity savours of a *res* just as much as a decree of divorce. . . . That judgement . . . (in the German Court) is equivalent to a judgement *in rem*.'

In Lord Dunedin's speech it is to be observed that even the distinction afterwards recognized in *Inverclyde's* case, between void and voidable marriages, is on the point of disappearance in the assimilation of nullity to divorce. When, according to all the precedents of nullity in Canon Law procedure, the status of marriage has been not merely removed as by divorce, but pronounced by the decree of nullity not to have existed *ab initio*, the learned Lord invokes the status of celibacy in order to show that the decree of nullity has declared the status of the parties. This is but to say that every human person has a status. It does not say that the apparent married status, assumed from the date of the irregular marriage until that of the decree of nullity, was, in fact, the status of marriage. It does not even say that the decree of nullity effected a change of status. The effect of the learned Lord's observation is simply this, that the decree of nullity declared that the parties were celibate, and that indeed is sufficient. As finding a judgement *in rem* to bind the Scottish Courts in a case of multiple-poining, the decision in *Salvesen's* case was valuable; but as a precedent for the settlement of nullity suits, where the question of domicile is raised, the argument in *Salvesen* would seem to be a radical departure from tradition.

The judgement in *Inverclyde (otherwise Tripp) v. Inverclyde* (*supra*) did not in fact exhibit so sweeping a view as this *dictum* seems to imply; for in *Inverclyde's* case the Court maintained the distinction between void and voidable marriages, and left the impression that had the petition for nullity been presented on a ground other than incapacity the Court would have accepted jurisdiction. At the same time we cannot ignore the tendency shown in *Inverclyde v. Inverclyde*, not only in the *dicta* quoted from *Salvesen's* case, but in the Judge's citation of the judgement of Lord Penzance in *Wilson v. Wilson*,<sup>1</sup> to prefer one Court, the

<sup>1</sup> (1872), L.R. 2 P. & D. 435, at p. 442.

Court of domicil, as for dissolution so for nullity; to extend the absolute bar of lack of domicil to suits for nullity on the ground of impotence, and, as in *Salvesen's* case, if not actually to impose the test of domicil to validate jurisdiction in a suit for nullity where the marriage is void, at least to cast doubt on the validity of the jurisdiction if the Court were not the Court of domicil. This is an awkward conclusion, because a void marriage—void on the ground of (e.g.) defective celebration, bigamy or consanguinity—is void as a fact, even if no decree is pronounced. Such a marriage was never valid; if, therefore, domicil were to be held to be requisite to establish jurisdiction, the mere lack of jurisdiction could not validate the marriage. If, in the case of *Inverclyde*, the ground had been (e.g.) bigamy and not incapacity, the Court presumably would have admitted jurisdiction, even though the parties' domicil were Scottish; for the allegation would have been that the marriage was void, not voidable, and according to the *lex loci contractus* the marriage would have been invalid. Otherwise, if domicil were to be requisite to grant jurisdiction in all nullity suits, the English Court would not have been able to pronounce the marriage void, whatever the ground, and thus, if (e.g.) bigamy were the ground, the jurisdiction to pronounce a decree of nullity would be confined to the Scottish Court on the ground of Scottish domicil, while in England only an indictment and conviction for bigamy would show the invalidity of the marriage. It may be questioned if the assimilation of the procedure in suits for nullity to that in suits for dissolution could have been intended to carry this consequence.

The argument in *Salvesen's* case seems to be this: Domicil is necessary to dissolution by divorce. Such dissolution is a judgement *in rem*, effecting a change of status in the parties and binding on all the world. In order that a judgement shall be universally binding, it must be a judgement *in rem*. Such a judgement is given by the Court of domicil, and a decree of nullity given otherwise than in the Court of domicil is not a judgement *in rem*. Since the decree of nullity was given by the Court of domicil, it was a judgement *in rem* affecting the status of the parties, not necessarily changing their status, but declaratory of what their status was or is. Therefore, if a decree of nullity is to be a judgement *in rem*, it requires the jurisdiction of the Court of domicil. Two questions arise: (1) Does it follow that because the Court was the Court of

domicil, therefore the decree was a judgement *in rem*, whether affecting a change in status, or merely declaratory of status? Is every decree of a Court of domicil a judgement *in rem*? The decisions in *Ogden v. Ogden*, [1908] P. 46, have suffered criticism almost to the point of repudiation in the *dicta* given in recent cases (*Att.-Gen. of Alberta v. Cook*, [1926] A.C. 444; 42 T.L.R. 317; *Salvesen v. Administrator of Austrian Property*, [1927] A.C. 641, *per* Lord Dunedin at p. 668, and *per* Lord Phillimore at p. 670; 43 T.L.R. 609, at pp. 614 and 616; *Inverclyde v. Inverclyde*, [1931] P. 29, *per* Bateson, J., at p. 48; 47 T.L.R., 140, at p. 144). Otherwise *Ogden's* case offers an example in point. The French decree of nullity was pronounced by the Court of the husband's domicil, but was not accepted by the English Court. If the Court of domicil were not the competent Court, presumably there was no competent Court, and 'the problem in *Ogden v. Ogden* was,' in Lord Phillimore's phrase, 'almost insoluble.' The French decree of nullity might appear to have changed the status of P. from that of a married man to that of an unmarried, who thus became free to marry the French woman, whom in fact he did marry. Actually, in France it did not change his status, because the essence of the nullity on the ground of the impediment of irregularity was that the marriage had never taken place. Equally in English law the decree did not properly change P.'s status, because the marriage was valid in England, the impediment admitted in the French Court being obstructive and not diriment. In French law P. had never been married; in English law he did not cease to be married.

The decree in the French Court was not, in the view of the English Court, a judgement *in rem*, in spite of its pronouncement by the Court of the husband's domicil, and was not permitted by the English Court to relieve the English wife of the status of marriage; so that *Ogden's* case, although no doubt exceptionally, would suggest that a decree of a Court of domicil is not necessarily a judgement *in rem*, binding on all the world. In *Salvesen's* case the decree of the Court of domicil was valid because the decree was pronounced by the Court of the domicil of both parties, apart from the fact that that Court held that the marriage had never been valid either by the law of domicil or by the *lex loci contractus*. Had the *in forma* wife in *Ogden's* case resided in France, and definitely conformed the domicil (which a wife is presumed to

take from her husband) to the definition in *Turner (otherwise Thompson) v. Thompson*,<sup>1</sup> the case would more nearly have been approximated to *Salvesen's*. But the French decree, which was in fact conclusive, would now perhaps have been accepted in England as a judgement *in rem*, even though by the *lex loci contractus* the English Court would not itself have had ground for granting a decree of nullity. *Salvesen's* case appears to be conclusive that, even if it is not strictly a *res*, which is the matter in issue, but, in Lord Dunedin's phrase, 'a metaphysical idea' which 'savours of a *res*,' the decree of the Court of domicile is a judgement *in rem*.

(2) Had the Court not been the Court of domicile—for according to English Law the residence of both parties gives jurisdiction in a nullity suit when the marriage has been celebrated abroad<sup>2</sup>—would the decree not have been recognized in the House of Lords or held binding on the Scottish Courts? Lord Haldane avoided this issue when he said: 'Whether there cannot be jurisdiction which is not that of the domicile in restricted instances to entertain a suit for nullity is a question we have not before us for determination.'<sup>3</sup> The same learned Lord had already narrowed the issue by his statement that, 'The real question is simply whether the Court of the domicile was competent to dispose conclusively and finally of the question before it. If so, it does not matter in law whether it had an exclusive jurisdiction.'<sup>4</sup> If, however, residence gives jurisdiction in a suit for nullity in English Law, presumably a decree in the Court of residence would be equally valid with a decree in the Court of domicile. But great stress was in fact laid on the exclusive jurisdiction of the Court of domicile and the consequent binding effect of its decree. Lord Phillimore stressed this consequence of exclusive jurisdiction:

'If the Court is a competent Court, still more if it is the only competent Court—and in my opinion the Wiesbaden Court was the only competent Court for these parties—its judgement must, for the very reason of the thing, be such a judgement as that described in *A. v. B.* (L.R. 1 P. & D., 559), a "definitive decree declaring a marriage void, which should be

<sup>1</sup> (1888), 13 P. & D. 37, *per* Hannen, P., at p. 41.

<sup>2</sup> *Vide* Dicey, *Conflict of Laws* (4th ed.), p. 302, Rule 56; *Scrimshire v. Scrimshire* (1752), 2 Hag. Con. 395, followed in *Mitford v. Mitford and Von Kuhlmann*, [1923] P. 130, *per* Merrivale, P., at p. 135.

<sup>3</sup> [1927] A.C., at p. 654.

<sup>4</sup> *Supra*, at p. 652.

universally binding, and which should ascertain and determine the status of the parties once for all.”<sup>1</sup>

But it will be seen that the learned Lord allowed the construction of his sentence to mean that the decree of a competent Court must be universally binding and determine the status of the parties. Apparently, then, a Court having jurisdiction to hear suits for nullity would be a competent Court, and its decree would be universally binding. If a decree of nullity be held to affect status, or to effect a change of status, the effect would thus appear to be the same whether the decree was pronounced by a Court of residence or the Court of domicile.

It happened that in *Salvesen's* case the Court was the Court of domicile, i.e. on the Continent the Court of *domicile*, which the English Court recognizes as the Court of domicile. It was, according to the English Law, the only competent Court to hear a suit for dissolution, and the only competent *German* Court to hear a suit for nullity in the case of persons situated, as the parties were, in (as it would have been *Anglicé*) *Salvesen (otherwise Von Lorang) v. Von Lorang*. But, according to English Law, since the marriage had been celebrated in Paris, the Court in Paris would have been competent to hear the nullity suit. Since, however, the Court at Wiesbaden was the Court of domicile, and the judgement was held to be a judgement *in rem*, affecting status, and binding on the Scottish Courts, the argument appears now to be that such a judgement can be pronounced only by the Court of domicile. Hence the decision on the issue of jurisdiction in *Inverclyde*, where Counsel for the respondent urged that whatever had been the practice of the ecclesiastical Courts, ‘the whole position had been transformed by the decision and *dicta* in *Salvesen's* case.’<sup>2</sup>

It is notable that in *Inverclyde's* case, whereas the Judge admitted that a bigamous or consanguineous marriage is void *ab initio*, he did not allow this admission in respect of a marriage voidable on the ground of incapacity. ‘In a case of this kind the parties are married and remain so, as long as neither seeks to renounce it’ (*vide* 47 T.L.R., at p. 141, col. 1). Even so, such a marriage when voided by decree becomes void *ab initio*. But it is clear that his Lordship's view had been shared by the Lord President in

<sup>1</sup> [1927] A.C., at p. 671.

<sup>2</sup> *Per* Mr. Norman Birkett, 47 T.L.R., at p. 142.

*Salvesen's* case [(1926), S.C., 598], who anticipated the assimilation of nullity 'founded on the impediment of impotency' to divorce, where the Court of domicile had exclusive jurisdiction. In any event, the judgement in *Inverclyde* showed a preference for the view upheld in *Salvesen's* case rather than for the tradition of the Ecclesiastical Courts. There is evidence of a deliberate tendency to the adoption of domicile as the uniform test of jurisdiction.

The new departure, if such we rightly account it, is not to be condemned merely because it can be described as radical. There is, no doubt, much to be said for the assimilation of jurisdiction in nullity suits to that in suits for dissolution. And since this tendency to assimilation is in evidence, it might then be allowed to apply to all nullity suits, and thus, in spite of the orthodox distinction between void and voidable marriages, to include both under the same rule, whether that rule be domicile or residence. But the English Law of domicile is seen to be the source of difficulty in the conflict of marriage laws, to which the case of *Inverclyde v. Inverclyde* has recently called a measure of new and close attention. And therefore the proposal seems to be justified that in cases where the Court's jurisdiction is in question, the new tendency to assimilation should be reversed, viz., not that the conditions of nullity be assimilated to those of dissolution, but that the conditions of dissolution should be assimilated to those of nullity. The old practice in nullity suits was satisfied with the condition that the marriage had been celebrated in England. If the parties had been married abroad, the Court was satisfied with the qualification of residence in England on the part of both parties at the institution of the suit, and, it might be said *a fortiori*, with that of the domicile of both parties. Thus marriage in England, or residence in England at the time of the institution of the suit, has given unquestioned jurisdiction to the Court. Why should not the same qualifications be approved as tests of the Court's jurisdiction in cases of dissolution? This is a clear reversal of the present tendency, but it would remove the standing difficulty of domicile.

The proof of English domicile is at present a condition of jurisdiction in causes for dissolution; but where domicile is employed as a test of jurisdiction in nullity suits, it cannot in some cases rightly be assumed until the Court has given judgement upholding the marriage, because if a marriage is pronounced null

and void a wife can never in fact have taken her husband's domicile.<sup>1</sup> This point has already been pressed in these pages; and although it was laid down by Sir James Hannen in *Turner (otherwise Thompson) v. Thompson*<sup>2</sup> that 'a woman when she marries a man does acquire the domicile of her husband, not only by construction of law, but absolutely as a matter of fact, if she lives with him in the country of his domicile,' it would seem that in the nature of a void marriage such domicile would be acquired not by marriage but by residence. This difficulty does not arise when both parties are in any event domiciled in England. But, as we have seen, it arose in the case of *Inverclyde v. Inverclyde*, because there, until such time as the marriage was voided, the English wife took her husband's Scottish domicile; but if the marriage had been pronounced void, it would, according to *P. v. P.* (*supra*) have become void *ab initio*, and a wife could not have acquired the domicile of a man to whom, in the nature of a nullity, she had never been married. To this point we shall return. But there are cases in which the identity of the wife's domicile with her husband's, even in prospect of the voidance of the marriage, may have to be assumed. If, in such a case as *Chichester v. Donegal*,<sup>3</sup> a wife is defendant in a nullity suit, it is clearly her admission that her domicile is that of her husband—otherwise it would be open to her to contest the Court's jurisdiction—and therefore she must accept the jurisdiction of her husband's domicile. Professor Westlake, holding that domicile *could not* be made a test of jurisdiction in nullity suits, admitted this case just cited as an exception.<sup>4</sup> And when Professor Dicey held that domicile *could* be made a test of jurisdiction in such suits,<sup>5</sup> we should have inclined to say that this same case marked the limit of this possibility.<sup>6</sup> But if in

<sup>1</sup> 'The wife's domicile would depend on the very matter in controversy'—James, L.J., in *Niboyet v. Niboyet* (1878), 4 P.D. (C.A.) 19. But, as Dicey shows, it must be admitted that this point is weakened through being part of the argument, since discredited by the law of *Le Mesurier*, [1895] A.C. 517, that domicile was not the true test of jurisdiction in suits for dissolution.

<sup>2</sup> (1888), 13 P. & D. 37, at p. 41.

<sup>3</sup> (1822), 1 Add. 5, 19.

<sup>4</sup> *Private International Law* (7th ed.), s. 49.

<sup>5</sup> *Conflict of Laws* (4th ed.), pp. 304, 305, 306. The implication is that domicile must be made the test of jurisdiction in the case of voidable marriages, but not (with certainty) in the case of those which in any event are void *ab initio*. Dicey cites *Johnson v. Cooke*, [1898] 2 I.R. 130, where a wife complainant accepted the domicile of the husband respondent as the only jurisdiction which the Court would recognize.

<sup>6</sup> I.e. until the decision in *Inverclyde*, following *Salvesen*,



such a case the wife defendant fails, i.e. the marriage is annulled, the question once more arises whether or not her assumption of her alleged husband's domicile was in fact valid. We should have held that, in the nature of a nullity, it would be valid until at the instance of one of the parties the marriage was pronounced void by the Court; but that the decree of the Court would show that it had not in fact been valid, and that even the validity of a voidable marriage was in the nature of a provisional assumption.

It is the difficulty of domicile which has brought out so acutely the distinction between void and voidable marriages, and has magnified the apparent contradictions in the conception of nullity. For where jurisdiction is established by undoubted domicile, the effect of a decree of nullity on the ground of impotence is admitted without question to be that of a decree of nullity on a ground on which a marriage is not voidable but void—such (e.g.) as a marriage within the prohibited degrees. The recent case of *Newbould v. Att.-Gen.*<sup>1</sup> provides an example. Here the legitimacy of the petitioner (under the *Legitimacy Act*, 1926<sup>2</sup>), depended on his father's not having been married to a third party at the time of the petitioner's birth. The father's first marriage had been annulled on the ground of this wife's incapacity in May 1929, the decree absolute following on November 25, 1929; but the child petitioner had been born on April 23, 1929. The question, therefore, was whether the first marriage was actually subsisting at the date of the petitioner's birth. Had the ground of the annulment been (e.g.) marriage within the prohibited degrees, it would have been void *ab initio*, and therefore there would never have been a marriage; but being on the ground of incapacity, the question was whether the decree of annulment took effect *ab initio*. The President quoted *Napier v. Napier, otherwise Goodban*, ([1915] P. 184; 31 T.L.R. 472), *per* Lord Cozens-Hardy:

'The Ecclesiastical Courts did not dissolve a marriage. They only declared that there had been no marriage at all; . . .'

and held the practice of those Courts to be conclusive that the decree of nullity had rendered the marriage void *ab initio*. Therefore the petitioner's father's first 'marriage' had never been a marriage, and was not subsisting at the time of the birth of the petitioner. Here the party concerned had the requisite English

<sup>1</sup> [1931] P. 75.

<sup>2</sup> 16 & 17 Geo. V, c. 60.

domicil, and there was therefore no necessity to repudiate the ecclesiastical practice in the interests of 'the living growth of English law' (as in *Inverclyde*, 47 T.L.R., at p. 142). The decision was without doubt in accord with the old ecclesiastical practice; and if, in contradistinction to *Inverclyde's* case (*supra*) following *Salvesen's* (*supra*), the effect was to assimilate voidable to void marriages, it may be noted that the President remarked what is an admitted distinction between void and voidable marriages, viz., that whereas void marriages are void as a fact, a marriage voidable on the ground of incapacity can be voided only at the instance of one of the parties and not by a third party.<sup>1</sup> For if one or both of the parties are impotent, they are free to remain married if they wish; and if the marriage has not been annulled, it cannot be impugned after the death of either party;<sup>2</sup> whereas if the marriage were bigamous, consanguineous or otherwise void, the parties might find that they could not remain in the state which had passed for marriage even if they wished, for their marriage would actually be void, and might be shown to be so at the instance of a third party. But this distinction does not alter the identity of the effect of a decree of annulment whether the marriage be void or voidable.

It might appear that the more recent decision in *Newbould v. A.-G.* (*supra*) is at variance with that in *Inverclyde* (*supra*); but although domicil causes a contradictoriness, a reconciliation is not impossible. If one of the parties to a marriage has obtained a decree of nullity on the ground of incapacity, the principle, according to the argument and decision in *Inverclyde* (*supra*), is that of dissolution; yet the effect is not to dissolve the marriage, but to void it. There is a clear contradiction in the facts that, whereas a voidable marriage is a marriage until it is voided, just as an adulterous marriage is a marriage until it has been dissolved, yet, while a dissolved marriage was once a marriage, a marriage which has been annulled on the ground of impotence becomes void *ab initio*, i.e. has never been a marriage. It is possible to accept this contradictory proposition as a theory in jurisprudence; but it is clear that suits for nullity on the ground of impotence must in practice be amenable either to the jurisdiction which is

<sup>1</sup> *Norton v. Seton* (1819), 3 Phill., 147; *A. v. B. and Another* (1868), L.R. 1 P. & D. 559.

<sup>2</sup> *A. v. B. and Another* (*supra*).

sufficient for other nullity suits, or to the jurisdiction which is requisite for dissolution. The Court has decided in favour of the jurisdiction which is requisite for dissolution (in *Inverclyde*, following *Salvesen* (*supra*)). Therefore the point which we raised, that the identity of a wife's domicil with that of her husband cannot rightly be assumed in the case of a suit for nullity until the suit has issued in a judgement upholding the validity of the marriage, applies not to voidable marriages, but only to suits on the ground that the marriage is void. To base jurisdiction in all nullity suits exclusively upon the husband's domicil might involve the Court in the assumption that the wife is a wife when she is not, and that she has acquired a domicil (her husband's) which in fact she has not. If the marriage be void, whether initially void, or voidable and actually voided by decree on the ground of incapacity, it may, of course, be the case that the *in forma* wife would have acquired the domicil, and would retain it by virtue of having cohabited with her *in forma* husband in the country of his domicil, i.e. by residence and intention; and thus her *in forma* husband's domicil would be her domicil, in fact and in law, independently of whether she had been a wife or no. This would seem to be the conclusion from the words of Hannen, P., in *Turner* (otherwise *Thompson*) *v. Thompson*, quoted *supra*. The 'wife's' domicil, derived from the fact of prolonged cohabitation with her *in forma* husband, would actually be her own. This was the case in *Salvesen* (*supra*), but not in *Ogden* (*supra*). Domicil thus acquired by a wife presumably would give jurisdiction to the Court to hear a petition for annulment on the ground of incapacity; but this is not inconsistent with the decision in *Inverclyde*, where the husband's domicil exclusively determined the jurisdiction; for apart from 'construction of law' it is not clear that the wife's Scottish domicil was acquired 'absolutely as a matter of fact,' which last condition is requisite in order to establish the husband's domicil as the wife's own in addition to its legal adoption by marriage. Although the effect of annulment in the case of a voidable marriage on the ground of incapacity is to annul the marriage *ab initio* [*Newbould v. A.-G.* (*supra*)], the suit is amenable only to the jurisdiction of the Court of domicil and is the equivalent of a suit for dissolution. The conclusion, established by the recent cases involving domicil, has accomplished a measure of simplicity by a contraction of relief, and may be said to

have added to the difficulties of domicile, to which other cases also point.

It may seem that a chapter on Domicil has contained more reference to annulment of marriage than to domicile itself. But our discussion of domicile is with definite reference to Matrimonial Causes; and it may be pleaded that this intensive enquiry into relief by annulment is due principally to the recent introduction of domicile as a test of jurisdiction in a nullity suit. Here we maintain that the tendency to legal uniformity, sound in itself, has been expressed in the particular article of retrogression, and we should prefer the substitution of an easier test for that of domicile as the test of jurisdiction. On the Continent the test of residence, or that of political nationality, has generally been adopted with the name of *domicile*. England and the United States of America stand out among the great countries in their retention of the more antiquated and complicated system of domicile, and even in the case of one of these, the United States, marriage is excepted from the incidence of the law of domicile. In England in all suits for nullity formerly,<sup>1</sup> and in the case of void marriages still, the fact of marriage in England, or the residence of both parties in England, dispensed with domicile; and some approximation to this simpler test, by concession on the part of England to international practice, would seem to effect a reform of signal value.

A step in this direction was proposed by the Royal Commission, and, if adopted, would have the effect of removing the disability of the wife in such a case as *Ogden v. Ogden*,<sup>2</sup> viz., that a marriage, valid by the *lex loci contractus*, but pronounced void by a foreign Court in the exercise of jurisdiction conferred by the law of that country, could similarly be pronounced void by the English Court. This is much to be desired, for it would mean that a marriage celebrated in England and valid in England, if annulled by the foreign Court of the parties' domicile, could consequentially be annulled by the English Court. The application of this principle in the case of *Inverclyde* would be interesting. The points are that (1) according to the historical ecclesiastical procedure (although no exact case, i.e. of incapacity, could be cited) marriage in

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England, or residence at the time of the institution of the suit, gave jurisdiction to the English Court in cases of nullity. But since the English Court disclaimed jurisdiction because the parties were domiciled in Scotland, then Scotland would provide the Court of domicil. (2) On the principle stated in *Salvesen's* case and cited as authority in *Inverclyde's*, the annulment of the marriage, had it been pronounced by the Scottish Court of domicil, would presumably have been accepted as a judgement *in rem* altering the status of the parties and universally binding. (3) But, in the absence of the precedent of *Salvesen's* case, the jurisdiction of the English Court might have been assumed in *Inverclyde's*, and a declaration of nullity would then have been pronounced in the English Court, the jurisdiction for suits of nullity being determined by the place of marriage or residence. (4) So also had the petitioner brought the suit in the Scottish Court in the old conditions, it would appear that either residence or domicil would have given jurisdiction according to English Law. (5) Had the suit been brought, not on the ground of impotence but of an irregularity in celebration of the marriage, then, if the Scottish Court pronounced the marriage null, appeal would lie to the House of Lords, where the Law Lords would refer to the *lex loci contractus*, that is to say, that they would judge the irregularity by the English Law. (6) But since the petition was brought on the ground, not that the marriage was void through irregularity, but that it was voidable through incapacity, the *lex loci contractus* could not upset the decree of nullity, because by the *lex loci contractus* a marriage is voidable on the ground of impotence. (7) Even if it be suggested that the validity of the marriage is a provisional assumption, because a decree of nullity on the ground of impotence will invalidate it, it remains valid in the absence of a decree.<sup>1</sup> But the *lex loci contractus* cannot maintain the validity of a marriage when impotence has been proved. (8) It would be unlikely that the English Court would have repudiated the authority of the Scottish Court's decree, seeing that the Court would be qualified not only by the residence of the parties but by their domicil. (9) Therefore the proposal

<sup>1</sup> *Elliott v. Gurr* (1812), 2 Phill. 16. N.B.—This case referred to prohibited degrees; but it illustrates the principle, because at that date such marriages were voidable in the Ecclesiastical courts, and remained valid in the absence of a decree.

of the Royal Commission, if adopted, would apparently not have assisted the petitioner in *Inverclyde's* case in the event of her having brought her actual suit for nullity in the Scottish Court. (10) But if her hypothetical suit in the Scottish Court had been on the ground that the marriage was void *quoad solemnitates*, the alleged irregularity being ground for nullity by the law of domicile but not by the *lex loci celebrationis*, then the proposed reform would have enabled the English Court at its discretion to annul the marriage consequentially upon the annulment in Scotland. These considerations are plainly independent of the actual circumstances of *Inverclyde's* case. There would appear to be no bar to the wife's suit for nullity in the Scottish Court of domicile, but only the objection that the Scottish Court would not entertain a petition for alimony *pendente lite* in such a case. Of course the wife may have sued in the belief that the celebration of the marriage in England gave jurisdiction in the case of a voidable marriage no less than when the marriage was void.

On the authority of *dicta* in *Salvesen's* case, even if the marriage were void, not voidable, it would appear that annulment in the Court of domicile would be treated as affecting status. This, as we must maintain, although it may be legally convenient, is not in accord with traditional principle because a void marriage has in fact never been a marriage: A voidable marriage, likewise, becomes void after decree of nullity, and therefore was void *ab initio*; but the distinction remains that a voidable marriage does require a decree of the Court to prove it so, and is legally valid pending such decree. Therefore the importation of the test of domicile as the test of jurisdiction in suits for nullity on the ground of impotence, as in suits for dissolution, although at variance with the traditional conception of nullity, has a clear justification, as well in reason, as by judicial decision. But the effect is to increase the difficulty of petitioners. Even if—to invoke our own expedients for the reform and enlargement of relief from a branch of our subject outside the sphere of annulment—suits on the ground of incompatibility would sometimes serve the needs of petitioners on the ground of impotence, this new relief would not dispense the petitioner from the requisite of domicile as the test of jurisdiction.

The argument points to the conclusion that domicile is an unsatisfactory test of jurisdiction in cases of nullity, and that the



alternative tests either of the place of celebration of the marriage, or of residence at the time of the institution of the suit, are not only adequate, but preferable on the ground of convenience; and that while, on legal grounds, it is desirable to assimilate suits for nullity and suits for dissolution, the assimilation should take the form of establishing for both the less problematical and difficult tests.

*Note on the Domicil of the 'Wife' after Decree of Nullity when the Marriage was Voidable*

The question has been asked with intent that it should receive answer in this chapter: 'In the case of a marriage declared void in a nullity suit upon a ground on which the marriage is *voidable*, what domicil does the ex-wife obtain? Does she revert to her pre-marital domicil? Does she retain her husband's domicil until she changes it?'

An answer is given by Professor Dicey in *The Conflict of Laws* (4th ed.), pp. 126, 127:

*Sub-rule 2.*—A widow retains her late husband's last domicil until she changes it.

*Sub-rule 3.*—A woman who is divorced or whose marriage, being voidable, is declared a nullity, retains the domicil which she had immediately before, or at the moment of, divorce or declaration of nullity, until she changes it.

On these statements the learned author makes the following Comment:

'The position of a divorced woman or a woman whose marriage, being only voidable, is declared by a competent court a nullity, presumably is for the present purpose the same as that of a widow.'

And to this Comment he appends this note:

'If a marriage is absolutely void, the wife presumably recovers her domicil at the time of the marriage; *vide* rule 65. But it is possible that by residence with a putative husband she may be held to have chosen a domicil in the matrimonial home. This seems supported by *Turner v. Thompson* (1888), 13 P.D. 37, *per* Lord Hannen; cf. *Mitford v. Mitford* [1923] P. 130. If the marriage is merely voidable, there can be no real doubt of the change of domicil. It must be remembered that, if a marriage is really void, e.g. on the score of bigamy, a decree of nullity is not necessary; either party may simply disregard it, and, if the issue arises, prove its non-existence in law.'

This argument accords with the position maintained by the same writer that only domicile gives jurisdiction to hear a suit for nullity when the ground is one which makes the marriage voidable (e.g. incapacity), *vide Conflict*, pp. 304-306. It accords with the argument and judgement in *Inverclyde (supra)*, viz., that a suit on this ground is a suit for dissolution in all but name. This view of voidable marriages has admittedly determined the jurisdiction, but it seems to exclude from consideration the point that when a voidable marriage has been voided by decree, it becomes void *ab initio* (*P. v. P.*, [1916] 2 I.R. 400 C.A.), and would therefore seem to place the parties in a different relationship from that which they would hold as the result of dissolution. Dissolution, like death, terminates a marriage of which the validity is not impugned; but annulment shows the so-called marriage to be null and void and pronounces it never to have been a marriage. It is, of course, true that an alleged voidable marriage on the ground of incapacity cannot be impugned without a decree of nullity, which must be at the instance of one of the parties [*Norton v. Seton* (1819), 3 Phill. 147—N.B., usually only the party who suffers the injury; also *A. v. B. and Another* (1868), L.R. 1 P. & D. 559], nor can it be impugned after death (*A. v. B.*, *supra*); whereas a void marriage is void as a fact, even without a decree. But the relation of the parties after decree of nullity on whatever ground would seem to be the factor which determines domicile, for Professor Dicey himself presumes that in the case of a void marriage the so-called 'wife's' domicile would be that which she held before the so-called marriage; and the effect of a decree of nullity is that the relationship does not exist because it never existed.

It is clear that we are dealing with derived domicile. The 'wife' apparently could acquire the domicile of her 'husband' by residence and intention [*Turner v. Thompson*, *per* Lord Hannen (*supra*); *Salvesen v. Administrator of Austrian Property*, *per* Lord Dunedin quoting Lord Hannen (*supra*)]. Such acquired domicile could not entirely lack the derivative element, but would be also concurrent in such wise that the 'wife' after decree of nullity would retain the domicile as her own until she changed it.

But, apart from this exception, it seems still to be a question if the 'wife,' after decree of nullity when the marriage was voidable, would retain the *in forma* husband's domicile until she

changed it. The recent assimilation of nullity suits to dissolution suggests in advance the decision of the Court. But the objection is persistent that a voidable marriage becomes void by decree of nullity; and void means, not dissolved, but non- and never-existent.

### (iii) IN SUITS FOR DISSOLUTION

Domicil is not a necessary condition of marriage, but is a necessary condition of the dissolution of marriage. Even if persons are married in this country, they cannot bring a suit for divorce in the English Court unless they can prove English domicil.<sup>1</sup> If after marriage they settle abroad, their divorce abroad will not be valid in English Law unless they have established foreign domicil in the country where the suit was brought.<sup>2 3</sup> If, however, they come home to bring the suit, they may be required to show that they have not acquired a foreign domicil. Since married women acquire their husbands' domicil until the marriage is dissolved or voided,<sup>4</sup>—that is to say, that they retain their husbands' domicil in cases of separation<sup>5</sup>—only a husband can change the domicil. But this he can do by adoption of a foreign residence coupled with evidence of intention to make the new residence permanent, and by so doing, i.e. by depriving the English Court of jurisdiction, he can defeat a wife's suit for divorce in this country.

The rule is established that married persons who petition for dissolution in the English Divorce Court must prove their English domicil; and their divorce abroad will be recognized in England only if the foreign Court has the requisite jurisdiction, i.e. only if the parties were domiciled in the area of the foreign Court's jurisdiction.<sup>6</sup> But there may be other possible disqualifications. The Court may not have the jurisdiction apart from domicil, as

<sup>1</sup> Book II, Section II, Chapter III (i).

<sup>2</sup> *Le Mesurier v. Le Mesurier* [1895], A.C. 517, where the divorce could not be granted (on more than one ground).

<sup>3</sup> Or unless the country in which they have established their domicil recognizes the validity of their divorce obtained in another country; *Armitage v. Attorney-General*, [1906] P. 135.

<sup>4</sup> *Turner (otherwise Thompson v. Thompson)* (1888), 13 P. & D. 37).

<sup>5</sup> *Attorney-General for Alberta v. Cook*, [1926] A.C. 444; *vide* Book II, Section II, Chapter III, (i).

<sup>6</sup> Or if the country in which they have established their domicil recognizes the validity of their divorce obtained in another country; *Armitage v. Attorney-General*, [1906] P. 135.

in *Le Mesurier v. Le Mesurier* (*supra*), where not only were the parties domiciled in England, but the Privy Council held that European residents in Ceylon, where the husband brought the suit for dissolution, were subject to Roman-Dutch Law, according to which law divorce *a vinculo*, although otherwise allowed, was not available to European residents whose marriage and domicile were in England. Or, the decree may violate natural justice if, e.g., the respondent receives no notice of proceedings.<sup>1</sup> Or, the Court may not be the Court of a country which is recognized in the scale of Christian civilization—a difficult condition to determine.<sup>2</sup> The English Court imposes the English Law of domicile to test the validity of the jurisdiction of courts in countries where the accepted test of jurisdiction is nationality or residence.

When the Majority Report of the Royal Commission was published in 1912, the new tendency to import the test of domicile into suits for nullity had not been manifested, and the recommendations of the Royal Commission were concerned with alleviation of the hardships in cases of dissolution, with the addition of a proposal for relief from such disabling effect of a foreign decree of nullity as the wife suffered in the case of *Ogden v. Ogden*,<sup>3</sup> to which we have referred in sub-section (ii) of the present chapter. Thus the Royal Commission recommended (1) that British subjects domiciled in England, but resident in one of the British dominions (such as, e.g., the petitioner in *Le Mesurier v. Le Mesurier* (*supra*)), should have their cases heard in their place of residence, and that the decree, when registered in the place of domicile, should be operative as if made in England, if it was made on grounds permitted by the law of the domicile. The Indian and Colonial Divorce Jurisdiction Act 1926<sup>4</sup> has effected this reform in respect of India, with powers of extension to self-governing dominions (*infra*).

Again, the Commission recommended (2) that (in order to prevent a wife's petition for divorce in England from being defeated

<sup>1</sup> *Shaw v. Attorney-General* (1870), L.R. 2 P. & D. 156; *Rudd v. Rudd*, [1924] P. 72; 40 T.L.R. 197.

<sup>2</sup> The determining factor appears to be whether or not marriage in such a country is monogamous; *Hyde v. Hyde and Woodmansee* (1866), L.R. 1 P. & D. 130, *per* Lord Penzance. Soviet Russia is recognized by the English Court, also Japan; *Nachimson v. Nachimson*, [1930] P. 217; *Brinkley v. Attorney-General* (1890), 15 P. & D. 76. *Vide* further in this section, *infra*.

<sup>3</sup> ([1908] P. 46).

<sup>4</sup> 16 & 17 Geo. V, c. 40.

by the husband's acquiring a new domicile which will oust the jurisdiction of the English Courts) if the parties are domiciled in England at the time of the commencement of the desertion or at the time of an act giving ground for divorce, no change of domicile should oust the jurisdiction of the Court in the suit on the ground of desertion or of the act, if the suit be instituted within one year of the act. This implies the adoption of the view advanced in various cases which were quoted in Book II, Section II, Chapter III (i). Further, the Commission recommended (3) that the deportation of an alien husband under the Aliens' Act should not oust the jurisdiction of the Court to entertain a matrimonial suit, brought by the wife of the alien so deported, which the Court could have entertained if the husband had been domiciled in England.

These proposals, if adopted, would give relief in some acute cases, but they leave untouched the position of those who are domiciled in England, but resident in a foreign country. The first of the Commission's proposals has been met to this extent, that the difficulty presented by the law of domicile in the case of persons resident in India has been mitigated by the Indian and Colonial Divorce Jurisdiction Act, 1926.<sup>1</sup> This Act provides, with power to extend its provisions to self-governing Dominions,<sup>2</sup> that a High Court in India shall have jurisdiction to grant a decree of dissolution, where the parties to the marriage are British subjects domiciled in England or Scotland, in any case where a Court in India would have jurisdiction if the parties were domiciled in India, subject to certain important provisions (s. I, (1)):

- '(a) The grounds on which a decree for the dissolution of such a marriage may be granted by any such Court shall be those on which a decree might be granted by the High Court in England according to the law for the time being in force in England; and
- '(b) any such Court in exercising such jurisdiction shall act and give relief on principles and rules as nearly as may be conformable to those on which the High Court in England for the time being acts and gives relief; and
- '(c) no such Court shall grant any relief under this Act except in cases where the petitioner resides in India at the time of presenting the petition and the place where the parties to the

<sup>1</sup> (*Supra*).

<sup>2</sup> The Powers have been extended by Order in Council, but have rarely been used by the Dominion Courts.

marriage last resided together was in India, or make any decree of dissolution of marriage except where either the marriage was solemnized in India or the adultery or crime complained of was committed in India; and

- ‘(d) any such Court may refuse to entertain a petition in such a case if the petitioner is unable to show that by reason of official duty, poverty or any other sufficient cause, he or she is prevented from taking proceedings in the Court of the country in which he or she is domiciled, and the Court shall so refuse if it is not satisfied that in the interests of justice it is desirable that the suit shall be determined in India.’

The effect of this Act is to limit the grounds for relief to those which are in force under the English Law at the time of any suit. In present conditions this is as much as can be effected. For although the same is possible in the case of the Dominions such a reform in relation to foreign countries, i.e. in the customary but not the domiciliary sense of the word ‘foreign,’ would depend on an international agreement. The difficulty lies in the fact that the laws in Matrimonial Causes exhibit so great a variety that, if the test of domicil were replaced by that of residence, persons of English domicil could, by residence abroad, obtain divorce on grounds not recognized in England and so defeat the provisions of the present English Law. If, then, divorces on other grounds than those admitted under the English Law were repudiated in England, the existing conflict of laws would not seriously be mitigated. The course of reform would therefore seem to lie not only in the adoption of a test of residence, as domicil is for the most part understood on the Continent, but also in an extension of the grounds in English Law. It is not, of course, suggested that the reform of the law in Matrimonial Causes is an incident in the removal of the difficulties of domicil, but that considerations of domicil do legitimately go to emphasize the unreformed state of the English Law.

Examples of the anomalies incidental to the English law of domicil where it touches matrimonial causes are available in the Law Reports and the standard text-books. We have considered some of these in earlier stages of this chapter. One of them requires further notice. *Ogden v. Ogden*, [1908] P. 46, which has figured in our treatment of annulment, is plainly relevant to the case of dissolution. Here the problem was acute and is not yet resolved. A marriage in England was annulled in France because

the French husband, P., who was under twenty-five years of age, had married in England without the consent of his parents, which the French law requires in the case of persons of that age. Since P.'s domicile was French, the English wife's suit for dissolution in England was barred for lack of jurisdiction. And when, assuming that the French decree of nullity was valid, she married again in England, the second marriage was held to be bigamous and therefore void. The *lex loci contractus* prevailed, and according to English law the wife remained married, although her husband had ceased to be married to her and had another wife in France.

The correction of the unhappy plight of the wife in such a case as *Ogden's* has been referred to proposals for additional grounds for annulment (*vide* p. 301 *supra* and Book IV, Section I (i), quoting Majority Report of the Royal Commission, *infra*). But this expedient does not probe the whole weakness of the position in that case. That weakness seems to lie in the fact that the jurisdiction in a suit for dissolution in the English Court being conferred by domicile, the Court in 1904 held that it had no jurisdiction to hear the wife's suit. But while the Court of Appeal in 1908 held that the French annulment had not relieved her of the married status and found her second marriage bigamous, it commented unfavourably on the repudiation of jurisdiction by the Court in 1904. Her first 'husband's' domicile was in France, where by the French law he was not her husband. In France this 'wife' was not a wife, and therefore her domicile could not be French, but English. In England she was P.'s wife, but her domicile appears to have been doubtful; for, whereas ordinarily it would be that of her husband, she had cohabited with him only in England for a short time, and had not resided with him in the country of his domicile. Therefore her domicile, if it were represented as French, did not conform to the definition in *Turner (otherwise Thompson) v. Thompson (supra)*. The effect of the more recent case of *Salvesen v. Administrator of Austrian Property*,<sup>1</sup> both by decision and *dicta*, has been to extend the domiciliary factor; and whereas in *Ogden's* case it was this factor which caused the refusal of relief to the wife in the English Court, in *Salvesen's* the effect was to enlarge the authority of the Court of domicile, and would therefore be to give greater credit to the decree of the Court of domicile in *Ogden's* case. Otherwise

<sup>1</sup> [1927] A.C. 641.

there would be no mitigation of the insularity by which the *lex loci contractus* was used in *Ogden's* case to disallow the decree of the French Court; and it would seem that the *dicta* in *Salvesen's*, in favour of the unimpeachable authority of the Court of domicile to pronounce a decree which is a judgement *in rem*, would have to be dismissed as *obiter*—a procedure which was attempted in *Inverclyde*, but not admitted.

It will be relevant here to cite also the protracted case of *Nachimson v. Nachimson*,<sup>1</sup> where the conflict of laws between England and Soviet Russia was begun in the Divorce Court, but happily averted in the Court of Appeal. This was a suit for judicial separation in the English Court which was brought by a Russian woman who had been married under the law of Soviet Russia, the parties being domiciled in Russia but resident in England. The question was raised whether or not the marriage was valid in English Law, and whether or not, therefore, the English Court had jurisdiction. The English Court does not recognize as valid the marriages of persons who contract them under the laws of non-Christian countries where marriage does not conform to the definition of monogamy.<sup>2</sup> There was no evidence that Soviet Russia practised polygamy; but another objection arose. Under

<sup>1</sup> [1930] P. 85, 217, C.A.

<sup>2</sup> *Hyde v. Hyde and Woodmansee* (*supra*). The definition of Christian marriage per Lord Penzance, P., is undoubtedly unexceptionable, viz., 'the voluntary union for life of one man and one woman to the exclusion of all others'; but his *dicta* which were *obiter*, although carrying weight, are at some points to be questioned. The implication that no marriage in a polygamous country or community is monogamous cannot be upheld in reason; but there are no decided cases to show that an actually monogamous marriage, on the part of persons whose *lex loci contractus* permits polygamy, would be recognized in the English Court. The decided cases so far point the other way. An able article in the *Law Quarterly Review*, Vol. XLVII, No. 186, April 1931, *Nachimson's and Hyde's Cases*, by S. G. Vesey-Fitzgerald, questions the moral, as contrasted with the legal distinction between a succession of monogamous marriages, each terminated by 'the facile formality of a divorce' and actual polygamous marriage; and the writer asks, 'Polygamy, concurrent or consecutive, . . . what is the moral difference?' If the intention of the parties that their marriage is to be indissoluble is the determining factor in respect of the duration of the union, why should not the intention that the marriage shall be monogamous be the determining factor in respect of the exclusive character of the union? The point appears to be that if the marriages of Soviet Russia are recognized, and rightly recognized in English law, why should not marriages in Oriental countries, where polygamy is permitted, be recognized in those cases where they are found, by the intention of the parties, to be permanent and monogamous?



Soviet Law either party to a marriage could dissolve the marriage at will on application to a court subject to a summons to the other, or the parties could dissolve it by mutual consent by registration.<sup>1</sup> The Judge (Hill, J.) held that on the ground of the facilities for its dissolution in Russia it was not a valid marriage in English Law, and that therefore the English Court had no jurisdiction.<sup>2</sup> On appeal, however, the Court of Appeal held that the marriage was valid, and that its validity could not be affected 'by consideration of the means whereby it might be dissolved, if and when that question falls to be determined by the law of the domicile of the parties.'<sup>3</sup> The jurisdiction of the English Court depended not on the ground of dissolution in the Court of the domicile, but on the conditions of marriage according to the *lex loci contractus*. Russian Soviet marriage was not polygamous or otherwise disqualified from recognition in England. Therefore the English Court had jurisdiction in a suit for judicial separation for which residence, without domicile, is sufficient. But since the Russian husband was domiciled in Russia, although resident in England, the English Court would not have had jurisdiction in a suit for dissolution. In this case, at any rate, the Court of Appeal decided that marriage in Russia was a valid marriage, and approved the principle laid down in *Sottomayer v. de Barros*<sup>4</sup> by the President, that 'marriage is a status arising out of a contract to

<sup>1</sup> Such was the Soviet Law of 1918; but the new Code of 1927 provided for both forms of divorce to be obtained by registration.

<sup>2</sup> The Judge extended the reasonable definition of Christian marriage which Lord Penzance had given in *Hyde's* case by the further phrase that the marriage of the parties 'is by them indissoluble except by death'—which if it were to mean anything more than an indication of what is the legitimate intention of parties who contract marriage, might seem to be an extraordinary definition to be offered by a judge who pronounced frequent decrees of dissolution in the English Court. N.B.—The processes of dissolution in Soviet Russia are in effect the *libellus repudii* and the *divortium communi consensu* of the old Roman Civil Law, but without the restraints and safeguards which a system, equitable in respect both of human needs and of the institution of marriage, may be held to require.

<sup>3</sup> [1930] P. 217, per Lord Hanworth, M.R. N.B.—It is important to note that the validity of the marriage *quoad solemnitates* is determined by the *lex loci celebrationis*, but the capacity to marry is determined by the law of domicile except in so far as the law of domicile allows a laxity (e.g. in prohibited degrees) which the *lex loci* prohibits. The conditions of divorce cannot affect the validity of the marriage, for they are not essential but only incidental. The validity of the contract is not affected by the conditions of its defeasance; *Warrender v. Warrender*, 2 Cl. & F. 488.

<sup>4</sup> (1879), P.D. 94, at p. 101.

which each country is entitled to attach its own conditions, both as to its creation and duration.' This principle is no doubt sound nationalism. It happens from the point of view of English Law to be favourable to the marriages of Soviet Russia, while that country's practice is monogamous; but it may be said incidentally to allow backward countries to frustrate the possibilities of international understanding.

The judgement in *Nachimson v. Nachimson* left some possible questions unanswered. While the Soviet marriage was recognized as valid (as marriage in polygamous countries would not be recognized) by the English Court, the question arises how far decrees of divorce in Soviet Russia would be admitted in England. Does the English Court recognize, apart from the validity of marriage, the law of a country which permits divorce without notice to the other party (a violation of natural justice), and divorce at will by registration where no discretion is given to a Court to refuse it?<sup>1</sup> Presumably, when persons domiciled and married in Russia are divorced in Russia, this is no concern of other countries; and the position of such persons, at whatever stage in their matrimonial development, will go unchallenged in England. But let it be supposed that the conditions of the *Nachimson* case are in part reversed, and the problem becomes interesting. Suppose, then, that when domiciled in Soviet Russia the Nachimsons were married in England. The English Court could not then hear a suit for dissolution. But if one of the parties (suppose the husband) went to Russia and obtained divorce without notice to the other party, and the other party's interests were at issue in England, would the divorce be upheld in the English Court, or repudiated? The English Court could have no jurisdiction to hear a suit for dissolution, because the parties would be domiciled in Russia; but if after such divorce in Russia the wife in England sought to establish her title to money settled on the marriage out of her own

<sup>1</sup> The very recent case of *Whittingham v. Whittingham* (otherwise *Sommers*) (*The Times*, November 3, 1931) throws no light on this point, because (1) the validity of the Russian Divorce, which was in question, concerned the law of 1918, not the Code of 1927; and (2) its invalidity was held because the President found that it had not been granted in accordance with the then Soviet law. The decree had been pronounced without notice to the other party, and without opportunity to the other party to appeal, when both notice and opportunity to appeal were requisite by the Soviet Law. But apparently the decree of dissolution by the Court of domicil would have been valid, had it been granted in accordance with the law of the domicil as this then stood,

estate, would the Court recognize that she had become a *feme sole*? Or, if both parties had repaired to Russia, obtained a divorce by mutual consent, and returned to England with other partners, would their marriages be held to be bigamous in England, on the ground that the divorce was obtained on grounds which were not recognized by the *lex loci contractus*? It may, of course, be held that the grounds admissible in Soviet Russia are undesirable, and ought to be repudiated; but the fact that these questions can be raised may be held equally to show the backward state of the English Law, which is brought to light by comparison with the laws of other countries (*vide* Appendix II). Another undetermined question which has arisen is whether or not the dissolution of a marriage of Russians, domiciled in Russia, by registration at the Soviet Consulate in England without notice to the other partner, would be valid in England. Marriages at Consulates abroad are valid if they comply with the *lex loci contractus*, according to the Foreign Marriage Act, 1892;<sup>1</sup> and, according to international law and usage, marriages at an Embassy or Legation are valid in England, provided that one of the parties is a national of the State which the Embassy or Legation represents.<sup>2</sup> But it is not established that this principle of extra-territoriality applies to marriages in Consulates in England.<sup>3</sup> These considerations, however, apply only to marriage, not to divorce, which, according to English Law, requires domicile. Although, therefore, this element of extra-territoriality has been admitted by law and custom in the case of marriages at Embassies, not only is it doubtful whether or not it applies to Consulates, but there is no evidence that the Soviet Consulate in England would be held to qualify as the Court of the parties' domicile.<sup>4</sup>

Our discussion of *Inverclyde (otherwise Tripp) v. Inverclyde* hitherto has fallen under the heading of annulment. But the news of Lady Inverclyde's divorce in the Court of Reno, in Nevada, renders the case amenable to reference under dissolution. This divorce in Nevada in no wise alters her status in England; for Lady Inverclyde's domicile was in Scotland, and the English Law

<sup>1</sup> 55 & 56 Vict. c. 23.

<sup>2</sup> *Ruding v. Smith* (1821), 2 Hag. Con. 371.

<sup>3</sup> *Bailet v. Bailet* (1901), 84 L.T. 272.

<sup>4</sup> The Russian legal experts who testified in Court to the then Soviet Law were not agreed whether or not the dissolution of the Nachimsons' marriage by decree of the Consular Court in Paris was valid.

recognizes no other jurisdiction in suits for dissolution. Therefore, if Lady Inverclyde re-married, her marriage would be bigamous in English Law (unless, of course, Scots Law recognized the Reno divorce).<sup>1</sup> From the extreme difficulties presented by the English Law in some cases to the apparent facility of divorce in Nevada, where not even the presence of the respondent is needed, and the divorce is granted presumably on the ground of impotence on the evidence of the petitioner, there is a gulf which might be bridged by an international understanding which would at once ease the difficulties at one extreme and raise the responsibilities at the other.

The argument derives support from the fact that the test of domicile is not in use in any of the more important countries except England and the United States of America, and in the States it does not apply to jurisdiction in divorce. On the Continent *domicile* has no such complicated definition, but is the equivalent of residence; and the test of domicile in English Law is everywhere finding its equivalent in political nationality. It is no part of our task in these pages to recast the law of domicile in its other relations, but it is relevant to urge that in relation to the law in Matrimonial Causes the test of residence should replace the test of domicile in the English Law; and that, in both the Imperial and the International spheres, a uniform system should be introduced in such wise that the present conflict of laws shall cease to invalidate in one country a marriage celebrated and valid in another, and that a simple test of jurisdiction shall relieve the parties to suits for both nullity and dissolution of their not uncommon exasperation and embarrassment.

NOTE.—It is not strictly relevant to the legal thesis of the above chapter, but is pertinent to the general subject of divorce in Russia, to refer the reader to the footnote on p. 360.

<sup>1</sup> The principle would then apply which we noted in *Armitage v. Attorney-General*, [1906] P. 135.

## CHAPTER VIII

### THE NEED FOR NEW GROUNDS

#### (i) THE CURRENT CONFUSION

The defects of the present Law in Matrimonial Causes are widely admitted by those who are familiar with its practice and by those who realize its consequences. Reformers who, in the interests of humanity and justice, are anxious to secure a large extension of the grounds for divorce are agreed that to-day divorce is at once too difficult for some and too easy for others; that while some victims of matrimonial misfortune deserve a dissolution on the larger consideration of private and public interest, but cannot obtain it, others, who cannot petition on the real ground, can bring an artificial and successful suit on the only ground which the law now recognizes, and yet others on this formal ground of proved adultery can secure the dissolution of their marriages with greater ease and speed than would be the case in a well-regulated system of mutual consent. Those who uphold the present law are largely governed by a desire to prevent what they would call a relaxation of its too liberal provisions, and thus misconceive the true purpose of reform. The open opponents of reform are not content with the law as the Act of 1857 and its successors have left it; but would, if they could, rescind it, and revert to the conditions of the Canon Law, with no dissolution, but only separation from bed and board and the canonical decree of nullity. But even the signatories of the Minority Report of the Royal Commission on Divorce and Matrimonial Causes, issued in 1912, confessed that there could be no reaction from the present facilities for divorce, and agreed with the Majority Report on the principle of the adjustment and adaptation of the law in the interests of human needs and sex equality. But the measure of their agreement was severely limited in practice, for the measure of the Minority's proposals was conditioned by limitation of the ground for dissolution to that on which at present a petition for a decree of dissolution can be filed. The Minority did not hold that any extension of the grounds for divorce was justified by consideration of 'the real interests of the community and with reference to the actual conditions of our day.' Twenty years have passed since the Royal

Commission sat; and, as the Attorney-General said in a recent case, the change of opinion and outlook in such social questions as divorce is so great that the twenty years seem like forty years.<sup>1</sup> To-day the conclusion of the Majority Report in favour of more liberal provisions for divorce is more widely accepted than when it was published. The extension of specified grounds, although not itself an adequate reform, is a contributory factor; and the proposals of the Majority Report for increased relief demand attention with a view to incorporation, amendment or extension, in a Reformed Law.

## (ii) ANNULMENT

Under the law inherited from the old ecclesiastical practice, a marriage may be annulled as void *ab initio* if at the time of the marriage one of the parties was insane. If the said party had already been certified a lunatic, the marriage is absolutely void;<sup>2</sup> if it is a matter of alleged unsound mind, but never actually subject to the provisions of the Lunacy Acts, the validity of the marriage will depend on the capacity of the person to understand the nature of the contract and the responsibilities and duties of marriage.<sup>3</sup> The Commissioners recommended five extensions of the right to petition for a nullity, of which the first two concern insanity:

- ‘(1) Where the other party, though of sufficient understanding to consent to a marriage, is at the time of the marriage of such incipient mental unsoundness as becomes definite within six months, the petitioner being at the time of the marriage ignorant of the defect (*Report*, Part XVI, p. 117);

<sup>1</sup> *Apted v. Apted and Bliss*, [1930] P. 246; 46 T.L.R., at p. 459.

<sup>2</sup> Under the Marriage of Lunatics Act, 1811, no such marriage can validly be celebrated until the person of unsound mind has been pronounced sane by the Court or a Lunacy Commission; and, even if such a marriage has been celebrated during a sane interval, it is void (*Turner v. Meyers, falsely calling himself Turner* (1808), 1 Hag. Con. 414).

<sup>3</sup> *Jackson (otherwise Macfarlane) v. Jackson*, [1908] P. 308, where a decree of nullity was pronounced on the ground of the man's insanity; *Forster (otherwise Street) v. Forster* (1923), 39 T.L.R. 658, where the decree of nullity was pronounced on the ground of delusional insanity. There are several other cases on this point, but actual insanity must be found such as to incapacitate the person from understanding the contract and duties of marriage.

- '(2) Where the other party is at the time of marriage subject to epilepsy or recurrent insanity, which have been concealed from the petitioner (*Report*, Part XVI, p. 118).

It was proposed as a condition of relief on either of these grounds that (a) the suit is instituted within one year of the celebration of the marriage, and (b) there has been no marital intercourse after the discovery of the defect.

Under the present law the grounds of annulment do not cover the case of one of the parties suffering from venereal disease at the time of the marriage. In the event of one of the parties having contracted such disease during the marriage, and not from the other party, a suit for dissolution of the marriage will lie on the ground of adultery.<sup>1</sup>

But there it is not the disease, but the adultery of which the disease is the evidence, which furnishes the ground. The Commission recommended the following new relief, viz.:

- '(3) If one of the parties at the time of the marriage is suffering from venereal disease in a communicable form, and the fact is not disclosed by the party, or, if they know of it, by his or her parents, or either of them, or anyone who has control over the party and is aware of the intended marriage to the other party, who remains ignorant of the fact at the time,' the other party should be entitled to petition for a decree of nullity with the same limitations as to suits as above (*Report*, Part XVI, p. 118).

The question arises whether or not any other disease beside venereal disease could equally justify a decree of nullity. Some infectious and incurable diseases will as effectually frustrate the objects of marriage as venereal disease, and will certainly exercise a preventive influence as effective as physical impotence. Therefore, if one of the parties to a marriage is suffering from a disease in an incipient form, which afterwards produces an effect equivalent to sexual impotence, and the fact is not disclosed to the other party at the time of marriage, we should recommend that this be a valid ground for a petition for a decree of nullity, with the same limitations to the suit as those recommended by the Majority Report.

<sup>1</sup> *Gleen v. Gleen* (1900), 17 T.L.R. 62; *Anthony v. Anthony* (1919), 35 T.L.R. 559. But the pleadings must contain a specific charge of adultery, and if there is no other evidence of the adultery, the charge must be pleaded on the basis of the contraction of the disease; *Walker v. Walker* (1912), 107 L.T. 655; *vide also Squires v. Squires* (1864), 3 Sw. & Tr. 541.

Although under the present law a marriage is voidable on the ground of impotence at the time of marriage if it still remains incurable, the sterility of a wife is not sufficient ground for making a marriage void if she is otherwise capable of intercourse;<sup>1</sup> nor is a wife's incapacity to conceive;<sup>2</sup> nor is her concealment, at the time of marriage, of pregnancy by another than her husband.<sup>3</sup> The Commission recommended that this last offence should become ground for a petition for nullity:

- '(4) Where a woman is found to be pregnant at the time of marriage, her condition being due to intercourse with some man other than her husband, and such condition being undisclosed by her to her husband who is ignorant of the fact at the time of marriage'; with similar limitations to the suit as in the previous cases (*Report*, Part XVI, p. 118).

A marriage is not voidable even on the ground of failure to consummate, unless such failure can be taken to imply incapacity. In the case of a woman incapacity may be inferred from hysteria or paralysis of the will which is traceable to repugnance to sexual intercourse;<sup>4</sup> and relief may then be given to a petitioner, but not if the refusal of a wife can be shown to be due only to obstinacy or caprice. A husband's neglect or refusal to consummate the marriage is readily taken to imply incapacity. Thus under the present law, as inherited from the ecclesiastical practice and exemplified in modern cases, relief is not completely barred when there is a refusal on the part of one spouse to perform conjugal duties; and, if the proposal of the Majority Report had been adopted, the existing bar, so far as it exists, would have been removed; for while, as above, relief is not given when a wife's refusal is due to obstinacy or caprice, the Commissioners proposed that a party to a marriage should be entitled to petition for a declaration of nullity—

- '(5) Where there has been wilful refusal without reasonable cause on the part of the other party to permit intercourse, and where there has in fact been no intercourse' (*Report*, Part XVI, p. 119).

There has of late been a tendency in the practice of the Court to grant a decree of nullity on the ground of what is known as 'constructive' impotence, as in the case above quoted (*G. v G.*,

<sup>1</sup> *B—n v. B—n* (1854), 1 Ecc. & Ad. 248.

<sup>2</sup> *L. v. L. (otherwise D.)* (1922), 38 T.L.R. 697.

<sup>3</sup> *Moss v. Moss (otherwise Archer)*, [1897] P. 163.

<sup>4</sup> *G. v. G.*, [1924] A.C. 349.



*supra*), i.e. where there is not necessarily physical incapacity, but active repugnance producing artificial but effective (and possibly muscular) obstruction. To whatever extent the spiritual aspect of marriage be exalted in contrast with the strong sexual emphasis of the Canon Law, it must still be maintained that wilful refusal of sexual intercourse frustrates a fundamental purpose of marriage, and a decree of nullity on this ground would provide the requisite relief in cases which the more liberal view of 'constructive' impotence does not touch.

Beyond these recommendations we should urge that no further extension of the grounds for a petition for nullity of marriage should be introduced; but that all persons who contemplate matrimony should undergo a pre-marital consultation and inspection at the hands of a medical specialist in sexology, and the report upon each be conveyed to the other. Then, in the absence of reasonable assurance of the normal sexual powers of the other, each spouse would marry at his or her own risk. It is, of course, possible that even after all precautions some defect may be discovered, and that in spite of all reasonable claims to marital loyalty the 'offended' spouse may still desire to end the marriage. Beyond the provision which we have proposed (following that of the Commission for the inclusion of venereal disease as a ground for nullity), the possibility of obtaining freedom would, in our scheme of reform, be limited by the rights and safeguards provided in the procedure for a decree of dissolution, and divorce under these provisions would not be obtained so quickly.

NOTE.—It is to be observed that the Minority Report concurred with the Majority in the five proposals for additional grounds for nullity.

### (iii) DISSOLUTION

The history of reform in this branch of Law shows that recent changes, although in the liberal direction, have been tentative and slow. Yet the legislation of 1857 was not regarded by its own authors as the last word in reform, but was conceived as an interim step, which would lead to a larger reform at a later date. It was as large a stride as its promoters could take in the circumstances of that time, and its most active and far-sighted exponents even then realized the need of more comprehensive and extensive

reliefs. Some reforms have been effected both before and since the Royal Commission's labours, alike in legislation and through more liberal interpretation of the Statutes in the practice of the Courts. But these have been effected on the basis of no change in the substantive law, and have not touched the pressing problem of the extension of the grounds on which divorce can be obtained.

It will be remembered that as long ago as 1906, in the case of *Dodd v. Dodd*,<sup>1</sup> the President, afterwards Lord Gorell, expressed the opinion that the abuses and cruelties which were allowed under the present law would not be corrected and removed without such a reform as would abolish permanent separation as distinguished from divorce, and would enable a decree of divorce to be obtained on the ground of such serious causes of offence as render future cohabitation impracticable and frustrate the objects of marriage. If the Royal Commission, which was appointed at Lord Gorell's suggestion and sat under his presidency, did not embody the whole of his proposals, the recommendations of the Majority Report went a long way towards the desired end.

Thus the signal difference between the Majority and Minority Reports lay in the recommendation of the Majority in favour of an extension of the grounds on which a dissolution should be obtainable. Of the eleven grounds which the Commission considered, the Majority recommended the retention of the ground of Adultery (as at present) and the adoption of the following five, viz.: (a) Wilful Desertion, (b) Cruelty, (c) Incurable Insanity, (d) Habitual Drunkenness, and (e) Imprisonment for Life under a Commuted Death Sentence (Report, Part XV, pp. 96 ff.).

(a) Wilful Desertion may be much more effective evidence of matrimonial collapse than a single act of adultery, which is now sufficient ground for a decree, and would so remain under the Commission's proposals. Desertion without reasonable cause for two years is, as we have seen, a ground for judicial separation, and was added by statute to the old grounds for a decree *a mensa et thoro*. Desertion for four years has been a ground for divorce under the Scottish law since 1573, when the Reformed practice was adopted in that country. There are some who suppose that desertion may be followed by the return of the deserter, and who accordingly contend against the proposal to allow desertion as a ground for divorce. But this contention, that the deserter may return and

<sup>1</sup> [1906] P. 189; 75 L.J. (P.) 49.

re-form the home, has not been used successfully against judicial separation, and has generally been disproved in experience; and the suggestion that divorce for desertion lends itself to the likelihood of collusion is not supported by the evidence of those countries where this ground obtains. The recommendation of the Majority Report, which provided the basis of more recent attempts at reform under this head, was that wilful desertion for three years should constitute a ground for dissolution. Perhaps our chapters on Separation may have shown the justice of this proposal.

(b) In the case of Cruelty, likewise a judicial separation is now obtainable, in accordance with the old practice of the Ecclesiastical Courts. Perhaps no offence more effectively frustrates the objects of marriage than cruelty, and no cause more surely warrants the dissolution of a marriage in the interests of the children of the marriage, if there be any. But against the inclusion of this ground as a foundation for a petition for divorce, it has been objected that cruelty is very difficult to define. Among the objectors on this count of difficulty of definition was the Archbishop of York, when speaking in the House of Lords' debate on Lord Buckmaster's Bill in 1920.<sup>1</sup> The Archbishop's words were:

'Here the difficulty is that it is so extremely hard to define what kind, character and degree of cruelty it is which justifies the termination of the marriage.'

To that objection the Lord Chancellor, Lord Birkenhead, replied:

'Let me inform the Most Reverend Prelate that while almost all definitions are difficult, there is no definition which it exceeds the resources and the ingenuity of the law to make, and if it be the policy of Parliament, where a case of cruelty of the kind which I have described is established, that that circumstance shall constitute a ground for divorce, we shall find no difficulty in formulating a definition which will be sufficiently lucid for the guidance of the Courts.'<sup>2</sup>

It may be said that the Majority Report had anticipated this difficulty with a tentative definition, viz. that

'Cruelty is such conduct by one married person to the other party to the marriage as makes it unsafe, having regard to risk of life, limb, or health, bodily or mental, for the latter to continue to live with the former, (*Report*, Part XIII, p. 71; Part XV, p. 99).

<sup>1</sup> Hansard, 1920, Lords, Vol. 39, p. 373.

<sup>2</sup> *Ibid.*, p. 675. *Vide also Points of View*, Vol. I, p. 224.

On what principles can it be maintained that permanent separation, with no right of marriage, is an adequate relief to a spouse endangered within the terms of this definition?

(c) The Commission dealt at considerable length with the question of Insanity as a ground. They pointed out that

- (1) insanity defeats the purpose of the marriage relationship.
- (2) insanity makes marriage, as a contract, incapable of fulfilment.
- (3) insanity lies outside the reasonable contemplation of the parties when they take the marriage vow "for better for worse."
- (4) insanity is unlike other bodily disorders, in that it involves the removal of the insane person, and effectually brings to an end almost every phase of marriage.

On this basis they recommended that continuous confinement under the Lunacy Acts for at least five years should constitute a ground for divorce, under various conditions and safeguards. The argument has sometimes been used that since lunacy is not the fault of the lunatic, therefore lunacy is not a matrimonial offence. But the answer is, that although the Canon Law tradition has given a criminal colour to the Divorce Court, this Court does not exist to balance blame or to try criminals, but to give relief; and further it is to be observed that the chance of the incurably insane recovering sanity is too remote a relief to be satisfactory to a patiently waiting spouse, who is perhaps still in early life, and might yet find a happy marriage. It may be noted that the Commissioners proposed that this relief should not operate where the age of the insane person is, if a woman, over fifty years, and if a man, over sixty years; and further that the relief should not be given to a petitioner whose conduct could be shown to have caused the insanity.<sup>1</sup> The Commissioners added their view that persons who, on account of physical or mental infirmity, are unfit to enter the married state and propagate healthy children should not be allowed to do so; and that those who are already married and have become unfit, should be debarred from intercourse. To-day it may be suggested that birth-control and sterilization could be made adequate safeguards to this end, without depriving defective persons of the 'mutual society, help and comfort' of married life. If a reform of the Law were limited to the adoption of the recommendations of the Majority Report, we should support the pro-

<sup>1</sup> So that, if this recommendation should find its way into statute, conduct conducing would become an absolute bar to a petition on the ground of insanity.

posal for the inclusion of insanity on the above terms. But, as will be realized, the proposals which we advance in Book IV, Section II, Chapter II (I) would render this recommendation superfluous, because a dissolution would then be obtainable after not more than two years from the first hearing in Court.

(d) Habitual Drunkenness provides a most effective termination to married peace and happiness, and may be the cause of other disintegrating factors. To those who suggest that Divorce Law Reformers give insufficient consideration to the position of the children of a broken marriage, the case of an habitually drunken parent offers a strong argument for the complete removal of the children from that degrading influence. The conditions requisite are such as will provide a home—the 'reconstructed family' of Napoleon's Civil Code—which the expedient of permanent separation in no wise secures. If it should be urged that habitual drunkenness also is difficult to define, reference may be made to the definition in the Habitual Drunkards Act, 1879, s. 3,<sup>1</sup> as this is amended by the Summary Jurisdiction (Separation and Maintenance) Act, 1925, s. 3:<sup>2</sup> (*vide* Rayden, *Divorce*, p. 97.)

when, not being amenable to any jurisdiction in lunacy, he is notwithstanding by reason of habitual excessive drinking of intoxicating liquor [or the habitual taking or using, except on medical advice, of opium or other dangerous drugs],<sup>3</sup> at times dangerous to himself or others, or incapable of managing himself or his affairs.'

It may be noted that while drunkenness is not in itself cruelty, it entitles a husband or wife to the protection of the Court against acts of cruelty committed under the influence of drink;<sup>4</sup> and more recently there has been a tendency to regard habitual drunkenness for purposes of relief as 'constructive' cruelty. But such relief is limited to permanent separation, of which we have sufficiently indicated the inadequacy.

(e) A Commuted Death Sentence, even if no lesser sentence of imprisonment be held to justify a dissolution, gives this obvious reason for a decree, viz., that had the death sentence not been commuted, the surviving spouse would be free to marry again forthwith; whereas, at present, if a death sentence is commuted,

<sup>1</sup> 42 & 43 Vict. c. 19.

<sup>2</sup> 15 & 16 Geo. V, c. 51.

<sup>3</sup> Summary Jurisdiction (Separation and Maintenance) Act, 1925, s. 3.

<sup>4</sup> Cf. *Walker v. Walker* (1898), 77 L.T. 715.

the innocent spouse becomes a separated celibate for life with all the risks which such a life entails. The suggestion has been made that examples of such hardship are few, and that therefore this reform is needless.<sup>1</sup> But even if this supposition were true, it would in no wise relieve the Legislature from the obligation of providing relief if justice demands it even for one single citizen.

These grounds for divorce are, of course, far from being entirely new; nor were they new when the Majority Report recommended their adoption. One or another of them has been in operation in various countries for considerable periods, and their adoption in this country would bring the English Law into some measure of conformity with general modern practice. Under the 'Effects of the Reformation'<sup>2</sup> we noted how far back some of these grounds can be traced in the Reformed practice both on the Continent of Europe and in Scotland, and saw that the abortive *Reformatio Legum Ecclesiasticarum* in England anticipated some and proposed others, including among its recommendations the abolition of permanent separation. A comprehensive scheme of reform to-day would probably include these grounds which were so carefully considered by the Royal Commission, and afterwards embodied (with the exception of the commuted death sentence) in Lord Buckmaster's Bill of 1920. But even these reliefs will not adequately serve the true ideal of the institution of marriage.

NOTE.—The Minority Report did not concur with the Majority in any of these proposals for the extension of the grounds for dissolution.

<sup>1</sup> This argument against the introduction of this ground was advanced in the House of Lords in the debate on Lord Buckmaster's Bill in 1920, and stirred Lord Birkenhead, L.C., to say to their Lordships, 'My Lords, I profoundly believe that justice is not to be measured in any such detestable scales.' The same argument, the lack of demand, appears to have been used by both the Archbishop of Canterbury and Lord Merrivale against the Marriage (Prohibited Degrees of Affinity) Bill on July 7, 1931 (*vide The Times*, July 8, 1931). The Bill, which sought to remove the prohibition of marriage with a nephew or niece by marriage, received the Royal Assent on July 31, 1931 (20 & 21 Geo. V, c. 31). Within one month four marriages under the new provisions were reported, so that it can hardly be said that there was no demand for it. In any event, although the number of persons who demand a measure may be effectual in obtaining it, it is difficult to be persuaded that the volume of the demand can alter its intrinsic justice.

<sup>2</sup> Book I, Chapter V.

## (iv) FURTHER GROUNDS CONSIDERED

The further grounds which were suggested to the Royal Commission and considered by the Commissioners but not recommended in either Report were: (a) Bigamy, (b) Disease, (c) Unconquerable Aversion, (d) Mutual Consent, (e) Refusal to Perform Conjugal Duties.<sup>1</sup> It requires that we now assess the claim of these grounds to be included in a reformed system.

(a) In 1912, when the Commission reported, there would have been more reason for the inclusion of Bigamy as a ground than there is to-day. Bigamy with adultery, according to the Matrimonial Causes Act, 1857, s. 27, was, and of course still remains, a ground for a wife's petition. But in 1912 adultery was an insufficient ground for a wife's petition, and it was not until 1923 that a wife could found a petition on the ground of adultery alone. The Matrimonial Causes Act<sup>2</sup> of that year, however, has virtually removed the need, which previously some reformers had felt, for the statutory inclusion of Bigamy as a ground. Since, and including, July 18, 1923, it has been unnecessary for a wife to prove more than adultery, unless the adultery with the person bigamously married had taken place before that date.<sup>3</sup> If a wife enters into a bigamous marriage, it is obviously unnecessary for the husband to prove more than adultery as a ground for divorce. It is thus needless to include Bigamy as a ground for divorce in any scheme of reform, saving only the retrospective provision to admit adultery before July 18, 1923, with bigamy, as under the Act of 1857.

(b) Disease as a proposed ground for divorce presents some difficulty. The principle once enunciated by the late Lord Gorell, that a decree of divorce should be permitted on the ground of any 'such serious causes of offence as render future cohabitation impossible and frustrate the objects of marriage,' is wide and elastic. Much depends on the interpretation of the word 'offence.' Is it an offence to be ill? or so ill as to destroy companionship and to frustrate intercourse? or so ill as permanently to prevent cohabitation and procreation? Of course, it is the case that in a marriage of true affection a petition for divorce on such a ground would be improbable. But in other marriages, where for other

<sup>1</sup> Report, Part XV, pp. 96, 97, 112, 113.

<sup>2</sup> 13 & 14 Geo. V, c. 19.

<sup>3</sup> Judicature (Consolidation Act), 1925, s. 176 (b).

reasons, as well as the disease, there is serious discontent, one spouse might feel well entitled to adopt any ground which the law provided; and certainly in any marriage in which sexual intercourse, or the interests of the family (e.g. the desire for an heir) were paramount, the disease of one spouse might be an 'offence' to the other.

The principle above quoted is patient of application in the case of insanity, which normally is not contemplated by those who contract marriage. But none who enters into matrimony can expect the other spouse never to be ill, or fail to realize the possible consequences of illness. Moreover, matrimony must be admitted to involve certain duties of honour, service and support, even when these are not actually directed by affection. Therefore it is not easy to draw the line in such wise as to define the measure of the disease which can be said to 'frustrate the objects of marriage' in the way in which insanity frustrates them. If it be suggested that such illness as renders it impossible, or unsafe in the interests of the health of a future family, to attempt procreation, or such illness as so far disqualifies one party as to be the equivalent of sexual impotence, should be the test, this ground can more suitably be adopted as a ground for nullity where there is evidence of the disease in an incipient state at the time of the marriage. In the case of an incurable and infectious disease sexual intercourse would plainly be wrong if it either endangered further the health of the diseased person, or was likely to infect the other spouse, or to lead to the birth of diseased children. But the law in respect of annulment on the ground of sexual incapacity applies only to conditions at the time of marriage, and the proposals which we have endorsed impose a time limit on suits after marriage. If a disease which leads to such incapacity as we have supposed has arisen at a later stage, it is on a different footing. Where this cannot be construed as a ground for a petition for nullity as 'constructive' impotence, it will provide a cause only under the new proposed procedure for dissolution, where relief, although ultimately obtainable, may not be rapid.

(c) The proposal that Unconquerable Aversion should be made a statutory ground for divorce recalls the 'deadly hatred' which the *Reformatio Legum Ecclesiasticarum* included in its proposals in the 16th century. The proposal may have been suggested to the Royal Commission of 1909 by the fact that it was at that time one



of the grounds for divorce in Austria. It is clear that if this unconquerable aversion exists on the part of one spouse towards the other, or if one regards the other with deadly hatred, the objects of marriage are, during its continuance, frustrated. At present, if this blight falls upon a marriage, the only means of escape is for one party to commit adultery. The hated party may choose to invite a suit by furnishing the requisite ground, with fair assurance that the hating party will use it. Or the hating party may furnish the ground, but without assurance that the hated party will use it. The hated party may petition for judicial separation, a course which is rarely taken by a husband, but is more commonly taken by a wife, and in such a case as this is more likely to be taken by a wife who has had her fill of marriage and is glad to punish the man who hates her. This possibility of abuse calls for resolute reform; for even if in present conditions the case ended not in separation, but in divorce, the divorce would be obtained on a ground quite different from the true cause of matrimonial trouble. Since a special stigma attaches in many walks of life to divorce for adultery, it is manifestly unfair that persons whose matrimonial trouble is in no wise adulterous should have to make it appear to be so in order to right their wrongs. There is thus a case for the introduction of this ground of Unconquerable Aversion; but in view of the undesirability of multiplying individual grounds which can otherwise be met, it is suggested that the need will be satisfied by the adoption of the new comprehensive grounds which we shall propose in Book IV.

(d) and (e) We shall now defer consideration of the next ground, Mutual Consent, which was proposed to the Royal Commission until Book IV, and proceed to the proposal (e) that a Refusal to Perform Conjugal Duties should furnish a ground for dissolution. As we noted in sub-section (ii) of this chapter, this ground was recommended by the Majority Report as a ground for annulment in the limited sense of wilful refusal without cause to permit sexual intercourse in a marriage in which there had in fact been no intercourse. The present law, as administered in the Courts, has shown a tendency to enlarge the conception of impotence to include some cases of refusal under the definition of 'constructive' impotence. But the present law, and even the Commissioners' proposal of that ground of annulment, concern only the refusal to consummate a marriage. Neither takes account of a studied

refusal of intercourse at a later stage; whereas in order to satisfy those reformers who propose this ground of relief, a new statute would have to make such refusal a valid ground at any time after marriage. It would be a matter of no difficulty to frame a statute in these terms. But a statute which would adequately guide the Courts, in such wise as to enable them to do justice, might not be so easy while the present conditions of procedure and the bars to relief continue in operation. For we are not here concerned with such married persons as are both affectionate and well instructed in the sexual factor in happy marriage, or with those who are deliberately unfaithful, or who bring straightforward suits on the ground of adultery, but with one-sided marriages of mutual misunderstanding, where not incapacity but disinclination is the source of difficulty on one side or the other. The ultimate remedy lies not in the Courts but in adequate education and mutual consultation. It is the old story of inconsiderate husbands and long-suffering wives, or of highly sexed husbands and arbitrary wives, or of uninterested husbands and highly sexed wives; and in these conditions either the worm turns at length and refuses, or an undue feminine independence frustrates the legitimate male requirements, or masculine selfishness starves a woman's soul. It may be that the possibility of divorce on this ground, like a Damocles' sword, would bring recalcitrant refusers to book; but, if unduly pressed, it might under the present law invite a counter-charge of cruelty, or (if the law were reformed to include cruelty as a ground for dissolution) a cross-petition on the ground of cruelty, which would sometimes be fully justified. Such pressure has been allowed to furnish the ground of cruelty in some unreported cases.

On the whole, and for the reason given in sub-section (c) against multiplying grounds, it is to be urged that this ground of refusal should not be included in the demand for reform of the law, and that the new sex knowledge, which is now spreading through society in all classes, will carry its educational effect into married life in such wise that husbands and wives will better understand their mutual needs, and adapt themselves with more consideration to one another's claims and aspirations of body and soul. For the true ground, after which the authors of this proposal might be said to be feeling, is larger than this physical refusal of marital rights and duties. The true ground is an incompatibility, of which

the sexual difficulty is one count, but not necessarily the only count; and this incompatibility, which, in spite of every precaution and consideration, may not have been discovered before marriage, is not necessarily covered by any of the proposed statutory grounds.

The conclusions of the Majority Report in favour of more liberal provisions for divorce are more widely accepted to-day than when they were published. But it is not untrue to say that the more widely the proposals are accepted and endorsed, the more deeply it is held that no proposals will be adequate which rest on the basis of the inherited principles and procedure of the Canon Law. While the public mind already accepts the principle of an extension of the grounds, there are some who see that this is not enough. For nothing less than a change of principle and procedure will ensure 'relief where relief is needed,' without the accompaniment of such artificial misrepresentation of the facts of matrimonial collapse as the present system promotes.

## SECTION II

### DIVORCE: 'NOT A DISEASE BUT A REMEDY'

#### CHAPTER I

#### SEXUAL REFORM AND SOCIAL BENEFIT

##### (i) MARRIAGE AND SEX

The factual failure of all systems to maintain the theory of indissoluble marriage, in any but external form, follows from the substitution of artificial conditions of marriage for its only true foundation. That is, of course, the mystical many-sided factor of love. If married persons have no love, it is not surprising that they fly to lovers. This is the inevitable feature of such a country as France, where parentally arranged marriages of convenience give an assurance of economic security to the marriage, but cannot guarantee the mutual affection of the spouses. The French have the reputation of being more successful lovers than most Englishmen, who are proverbially *gauche* performers of that subtle art; so that the French husband and wife, with their recognized lovers outside the marriage, may in some aspects be found to make a better success of the marriage itself than many English couples, with no such external interest or distraction. It is perhaps an excessive statement that the success of marriage is determined by the marriage bed; but it cannot be denied that successful sexual life is one of the conditions which are primary in importance for successful marriage. One of the speakers at that highly significant event in the recent progress of sexual knowledge in this country, the Sexual Reform Congress of 1929, laid an emphasis on the importance of sex in life, which has not commonly been conceded, and many traditional minds will still refuse to concede. In one paper, 'Sex and Shame,' the reader asserted that

'there is infinitely more unhappiness in the world due to sexual ignorance than to any other cause whatsoever. All the suffering due to poverty is nothing compared to it. . . . None of the other misfortunes with which we have to contend in life are so intimate, strike so deeply into the whole of the personality, as suffering due to unsatisfactory sex-

life. And it may be asserted that the great majority of people in all civilized countries lead unhappy sexual lives.<sup>1</sup>

He then gives some illustrations, such as 'the misery of too many children and the horrible conflict which dominates the lives of those among the poor who are ignorant of contraception,' and the psychological causes of impotence and incapability of normal sexual satisfaction. Then he proceeds:

'Now, sex is the fundamental thing in life. It is the predominating interest of healthy people. Every sensible person knows this and arranges his life accordingly, but many will resent its being said. Those who deny it are merely reacting negatively to its dominating rôle in their imagination. It is the greatest source of human happiness, the thing, as Eugene O'Neill puts it, for which we go on living.

'But there is no subject of great human interest on which so many people of all ranks of society are so ignorant as sex. No amount of intelligence on any other subject is any guarantee that an individual knows the first thing about it. The number of people who are familiar with the anatomy and physiology of sex is incredibly few; but when we come to its psychology the number becomes infinitesimal. One interesting case is that of the medical profession. Many of the lay public still assume that doctors know all about sex, not realizing, as Mr. Ernest Jones puts it, that "sexual topics are as carefully avoided in medical schools as they are in girls' schools."'<sup>2</sup>

The reader of this paper maintains that the results of the science of sexology, if made known, are capable of curing most of the unhappiness in the world, which is due to inadequate sex knowledge; and goes on to note the psychological task of the conquest of the sense of shame, which he describes as 'the fundamental task of sexual reform.'

When Mr. Jerdan lays this stress upon the dominance of sex, and quotes another to the effect that sex is 'the thing for which we go on living,' the first question is whether or not this is a fact. A second question will be raised by many people, whether or not it is a desirable fact; and some religious minds will perhaps continue to advocate the repression of an original instinct which they hold to be detrimental to the development of the spiritual life. The facts alleged, viz., that sex is the source of the greatest unhappiness, and that sex has the potency for becoming the source

<sup>1</sup> *Sexual Reform Congress Proceedings*, 1929: 'Sex and Shame,' by E. S. Jerdan, B.A., LL.B., p. 409.

<sup>2</sup> *Op. cit.*, p. 410.

of the greatest happiness, may perhaps be qualified by the contribution of finance to human happiness. Not vast riches, but at least a modest competence is a condition of happiness; and financial distress will certainly neutralize the potentialities of sex as a source of happiness. It is perhaps the case that great intellectual preoccupation and effort detract from sexual vigour. But in general, in the absence of the financial disqualification, there can be little doubt of the influence of sex both as a promoter of happiness when understood, and as a preventive of happiness among those who have not learnt its secrets. Granted the true place of importance which we admit that sex occupies in human life, we have to confess that this place of importance is the right place. In the degree in which we admit the fact, we admit that it is a desirable fact. If it is not the whole reason why 'we go on living,' it holds a secret whereby great numbers of people could progress with much greater contentment and much more productive effort than mark their lives at present. The independent creative power of sex functions over a much larger field than is expressed in the primitive urge to procreation. And it is, of course, in marriage that men and women are proving this for themselves, and will prove it in ever greater numbers as sexual education spreads.

The modern world has begun to advance beyond the stage at which 'sex' in marriage meant merely the repetition of physical pleasure for the male partner at his will and inclination, while the female played a purely passive part. This passive part the wife was taught to regard as her duty. She rarely derived from it the physical pleasure which is as well her right as that of the male; yet as a result of it she bore children in greater numbers and in more rapid succession than her health would properly allow. This was commonly the case in this country for centuries; but it was not always true of the ancients, either in the East, where sex was better understood,<sup>1</sup> or in the Roman Empire, where the evidences show that women played an active part in sex-life.

To-day we realize that although the primary purpose of nature—primary both in time and in the primitive estimate of its importance—in ordering the sex-act was the propagation of the species, there was always a secondary purpose, which now is verified in the health and well-being of the participants. Nature labours at

<sup>1</sup> Cf. the position of women in Ancient Babylon and Egypt. *Vide* Book I, Chapter I, *supra*.

the task of peopling the world. But the task of civilization is to adapt the human race to current conditions, in such wise as to produce the greatest measure of advantage to the individual and the race. Science has come to the rescue to arrest or avert those ravages of nature by which a superabundant population was kept within bounds; so also science has shown the way to regulate the birth-rate by methods more orderly and humane. The high efficiency of the most modern methods of birth-control permits the regulation of the birth of children by choice and not by chance, and enables men and women, released from the physical consequence, to develop and exploit the sexual emotions in the multifarious interests of love for the benefit of the body and the soul. As Dr. Havelock Ellis writes:

'Birth-control is effecting, and promising to effect, many functions in our social life. By furnishing the means to limit the size of families, which would otherwise be excessive, it confers the greatest benefit on the family, and especially on the mother. By rendering easily possible a selection in parentage and the choice of the right time and circumstances for conception, it is, again, the chief key to the eugenic improvement of the race. There are many other benefits, as is now generally becoming clear, which will be derived from the rightly applied practice of birth-control. To many of us it is not the least of these that birth-control effects finally the complete liberation of the spiritual object of marriage.'<sup>1</sup>

And again:

'Sexual activity, we see, is not merely a bald propagative act, nor, when propagation is put aside, is it merely the relief of distended vessels. It is something more even than the function by which all the finer activities of the organism, physical and psychic, may be developed and satisfied. Nothing, it has been said, is so serious as lust—to use the beautiful term which has been degraded into the expression of the lowest forms of sensual pleasure—and we have now to add that nothing is so full of play as love. Play is primarily the instinctive work of the brain, but it is brain activity united in the subtlest way to bodily activity. In the play-function of sex two forms of activity, physical and psychic, are most exquisitely and variously and harmoniously blended. We here understand best how it is that the brain organs and the sexual organs are, from the physiological standpoint, of equal importance and equal dignity. Thus the adrenal glands, among the most influential of all the ductless glands, are specially and intimately associated alike with the brain and the sex organs. As we rise in the animal series, brain and adrenal glands march side by side in developmental increase of size, and at the same time sexual activity and adrenal activity equally correspond.

<sup>1</sup> *Little Essays of Love and Virtue*, p. 73.

'Lovers in their play—when they have been liberated from the traditions which bound them to the trivial or gross conception of play in love—are thus moving among the highest human activities, alike of the body and of the soul. They are passing to each other the sacramental chalice of that wine which imparts the greatest joy that men and women can know. They are subtly weaving the invisible cords that bind husband and wife together more truly and more firmly than the priest of any Church. And if in the end—as may or may not be—they attain the climax of free and complete union, then their human play has become one with that divine play of creation in which old poets fabled that, out of the dust of the ground and in his own image, some God of Chaos once created Man.'<sup>1</sup>

Thus the primary purpose of the sex relationship has been overtaken by the secondary. The physical has given place to the psychical or spiritual; and this last now commands the physical, and expresses itself through the physical act without necessarily incurring the physical consequence of propagating the species. The human race is working its way up from the animal condition to a higher level of life and purpose in which it is seen that the sex-act, while rightly creative of children in numbers and at intervals adapted to economic competence, is properly productive of independent results in physical well-being, in mental satisfaction, and in a variety of creative effort in more profitable ways than in adding recklessly to an already excessive population.

## (ii) BIRTH-CONTROL

There are, of course, opponents of the growing practice of birth-control—other than His Holiness, the Pope, whose mediaeval pronouncements are read with a melancholy interest by many who feel that the Catholick Church is hostile to human welfare—who still maintain the primary purpose of sex relationship in the sense that the secondary remains secondary, not only on the point of later development in time, but in present purpose and importance. For them the secondary is subordinate and actually conditional on the primary. Such appears to be the position of those Bishops who voted in the minority on Resolution 15 at the Lambeth Conference in 1930. The opposition to control of conception by any means other than abstention from sexual intercourse is assuredly dictated by the most conscientious conviction that such intercourse is

<sup>1</sup> *Ibid.*, pp. 131-133.



intended for the sole purpose of the procreation of children. But this attitude represents the animal stage, from which civilization has begun to emerge. It must be admitted that the Birth-control resolution at Lambeth was somewhat compromised and vague, and it has enabled a protagonist of the minority, the Bishop of St. Albans, to criticize its authors on that account.<sup>1</sup> But the Bishop of Liverpool, writing in support of the Resolution, has given unequivocal evidence that it admits of generous interpretation. His language might suggest that some of the Bishops, who have since given the impression of qualifying the words of their resolution, allowed themselves to be committed to more than they realized at the time. In answer to those of the Minority who argued that contraceptives must be wrong because they are 'unnatural,' Dr. David writes:

'Man's advance in civilization is the story of his growing control of nature for worthy ends. That his new power of interference may be mis-used, as in the case of drugs, is no argument against his right to use it. Our power to control procreation is the latest step in that advance. It is within the purpose of God, and like every previous step it makes a new demand upon our moral responsibility. We must face this demand, not by refusing the power but by using it aright.'<sup>2</sup>

And in view of the misunderstanding which may arise over the statement of the Conference's Resolution that 'The primary and obvious method (of limiting or avoiding parenthood) is complete abstinence from intercourse,' the Bishop makes it quite clear that 'primary' here means primary in obvious order, not in importance. For he writes for all the world to read:

'At the end of the debate it was explicitly stated, and the statement was not challenged, that, as here used, the word gives no moral superiority to abstinence, and that no such primacy can be given to any method in itself.'<sup>3</sup>

These statements of the Bishop of Liverpool must be taken as authoritative, and regarded as extremely hopeful of a great improvement in ecclesiastical attitude. The point emerges that while no preference can rightly be given *a priori* on moral grounds

<sup>1</sup> *Marriage and Birth-Control* (The Lambeth Series), by the Bishops of Liverpool and St. Albans, pp. 35 and 39.

<sup>2</sup> *Ibid.*, p. 15.

<sup>3</sup> *Ibid.*, p. 19.

to one method of birth-control over another, a preference must be given to one over another on medical and sexological grounds.<sup>1</sup> It follows that some methods, being inferior on medical grounds, must also be condemned as inferior *a posteriori* on moral grounds. Knowledge is God's gift, and it is not good morals to reject the light. Since, then, the 'primary and obvious' way (i.e. of abstinence) may be productive of nervous strain (the harmful effects of which the Bishop of Liverpool admits), it follows that on moral grounds—i.e. in the highest interests of the God-given purposes of sex—the method of abstinence is inferior to that of the more efficient contraceptives. This conclusion is no mere debating point. It follows from the basis of the knowledge and experience of the age. But the argument against the use of contraceptives

<sup>1</sup> E.g., *Coitus interruptus*, or withdrawal (which is condemned as destructive of health), and the so-called 'safe period' (which defeats the purpose of sex-life because it involves the choice of the time of the woman's least desire, and even so is uncertain of preventive effect), are inferior on medical grounds to the Dutch Cap or the Gräfenberg Ring, although recent evidence has thrown some doubt upon the complete reliability of the last-named. The argument would in present conditions rule out abortion, which is a method not of birth-control but of birth prevention, because at the best, even where necessary on medical grounds, it is admitted that it is an 'interruption of a physiological cycle' (vide Norman Haire, Ch.M., M.B.: 'Sterilization, Abortion, and Birth-Control,' in *Sexual Reform Congress Proceedings*, 1929, at p. 110), and at the worst it may be dangerous to the health of the individual and is a violation of the Criminal Law. There is evidence of some demand for the admission of abortion among the orthodox and legal methods; but the propriety of this demand cannot be said to have been conclusively established. A valuable comparative study of methods, under the title *The Comparative Value of Current Contraceptive Methods*, is published by the Cromer Welfare Centre, Cromer Street, London, W.C.1, at one shilling, reprinted from the *Proceedings of the Sexual Reform Congress* at Berlin in 1926 (by Norman Haire, Ch.M., M.B.). This does not, of course, include abortion, and the date was early for a treatment of the Gräfenberg Ring. Otherwise it is an exhaustive and illuminating paper, only marred in the last few lines by a reference to 'non-medical "doctors"' in the category with quacks and charlatans. This is an example of the tendency to an incorrect monopoly of the term 'doctor' by the medical profession. A Doctor has no primary or exclusive connection with medicine, but is one who holds a Doctor's degree, the old order of precedence being Divinity, Law, Medicine. The inverted commas should be employed not in the case of non-medical Doctors, but when the word is used of a medical practitioner who does not hold the degree of Doctor. For a full account see *Contraception: Birth Control; Its Theory, History and Practice*, new edition, 1931, by Marie Carmichael Stopes, D.Sc. The present writer may perhaps mention his little pamphlet, *Birth Control: A Key to Unemployment and a Way to Married Happiness* (Noel Douglas, 1930), written to encourage the work of a Birth-Control Travelling Clinic which practised for two months at his invitation in a populous colliery district.

amounts to no more than this, viz., that contraceptives are contrary to Christian tradition, and that because the primary purpose of sexual intercourse was procreation, therefore the discovery of the superiority of the secondary purpose is to be disallowed.

This attitude is, as we maintain, representative of the animal stage, from which civilized mankind is emerging. Progressive pioneers of the higher sexual purpose will have to continue to wrestle with the obstructive relics of the dark ages and the played-out past; but the end of the conflict is in sight, or at least the end of one stage of the conflict. The need for instruction in the use of contraceptives, for women for whom further pregnancy would be dangerous, is gaining official recognition.<sup>1</sup> Such information has long been available to the richer classes, who can obtain the best advice from medical and sexological specialists. But for the poorer classes the Birth-control clinics, which have been established by various enterprising societies, are to be found only at rare intervals about the country, and then only in large centres of population. Therefore the steps which have been taken under the direction of the Ministry of Health to provide instruction at maternity and child-welfare centres under municipal bodies and county councils are to be welcomed, and will effect an improvement when and where they have been adopted. Perhaps now we shall be spared the unedifying spectacle of further ecclesiastical opposition to humane measures, or a repetition of such clerical counsel as was given in a disastrous case, quoted with evident approval by a well-known clergyman writing against birth-control as recently as 1929.<sup>2</sup> 'Come together again and leave the issue in God's hands' was the advice given to a husband whose health suffered from sexual abstinence, while his wife had been warned that another pregnancy would probably be fatal. The pair took this advice with their eyes open. The wife died; and the way the selfish husband bore his loss was described as 'a signal instance of the power of a true Christian.' In view of the health of both husband and wife, the alternatives which lay before their

<sup>1</sup> On the need of wider instruction in good methods of Birth-Control on this and other grounds, witness the vigorous observations of Mr. Justice McCardie at Leeds Assizes, given with all the weight of his experience as a Judge of Assize (*vide The Times*, December 12, 1931; the *Morning Post*, same date).

<sup>2</sup> *The Christian and Birth-Control*, by the Rev. The Hon. Edward Lyttelton, D.D., pp. 84-87.

choice were complete abstinence or adequate precautions against pregnancy; but in the event the man's conduct would rightly be judged as inconsiderate and stupid to the point of crime.

The new sex knowledge and the best methods of birth-control have not as yet found their way sufficiently among the poorer classes, and it may seem that the more privileged classes have been limiting their families disproportionately. As the Dean of St. Paul's writes, after reviewing the figures of births in different sections and professions, 'the cumulative effect of such drastic dysgenic selection as these figures indicate can only be the progressive deterioration of the race.'<sup>1</sup> To removing the suspicion of class prejudice which sometimes attaches to the pronouncements of eugenicists, it ought to be asserted that while breeding from the best stocks is plainly desirable, it does not follow that the best stocks are necessarily those who are richer in financial competence. But the poor, who could produce good specimens, are so often overburdened by too many children to admit of the best nourishment and education.

It is sometimes suggested that the poorer classes will never adopt the best methods of birth-control. At present for the most part they have only had the opportunity of using the worst. It is early to prophesy, but there is great hope of sound ideas and good methods filtering deeply and widely. And if this comes to pass, the steady spread of the better methods will do more than avert undesired pregnancy. It will emancipate the sexual impulse in all classes, for its higher ends of spiritually creative life and purpose. But at present a great weakness lies in the inability of many women to master the best methods. Ignorance and nervousness on the part of patients defeat the best efforts of instructors in clinics; and when instructions are improperly carried out, it is not surprising that the methods in some cases are found to be ineffective. As Dr. Norman Haire has said: 'Everybody seems to live in the hope that we shall one day discover a method of contraception which is 100 per cent. certain, absolutely foolproof, can be taught by an idiot to an idiot, and entails no expense or trouble whatever. I myself do not feel optimistic about this.' The hope lies with the younger generations of married people who will take the trouble to begin on the right lines for the sensible regulation of their sexual and procreative life.

<sup>1</sup> W. R. Inge, K.C.V.O., D.D., *Christian Ethics and Modern Problems*, p. 270.

The report now comes from Germany and Sweden, where the medical profession gives instruction in the methods of birth-control to the poorer classes in the large cities, that the old discrepancy between the breeding proclivities of different classes has disappeared. Indeed, the effect is even further reaching, for now the richer classes tend to have larger families than the poorer.<sup>1</sup> In view of the large unemployment figures from Germany, the value of this development will be felt in years to come, just as the effect of a similar process in this country would be felt in the course of several years. This does not mean that there would be any conspiracy on the part of the married to have no children. Children are desirable both for the good of the race and for the happiness of married life; but both of these good results require that the children should be spaced to suit the health of the mothers, and should be produced only in such numbers as are consistent with economic ability to give them adequate nourishment and education. The result of this process of emancipation, when more widely spread, will be realized in a new conception of the institution of marriage. Man will be the master of marriage, not its slave. Of course, the creative instinct will never be completely separated from the procreative. There is assurance of sufficient births to keep the world adequately peopled. But these will be the result of the rational choice of men and women when they deliberately intend to divert their sexual energies into that channel. But men and women will realize that marriage means much more than the reproduction of the species, and they will not rest content with the legal institution if it does not realize its full psychical promise in a perfect sexual equilibrium, above both the drab domesticity which is now sanctified as an indissoluble sacramental union and the irregularity which is the resort of some who break with a discordant union.

### (iii) MARRIAGE AND DIVORCE

Whereas it is precisely the animal stage which produced our present laws of marriage and divorce, the improvements which have been effected in the law, and some of the reforms which on some grounds are thought to be of doubtful advantage, are signs

<sup>1</sup> *Birth-Control Review*, March 1931, p. 80, quoting Dr. Carl Edin of Sweden, Dr. Alfred Grotjahn of Germany, and Dr. Freidrich Burgdorfer of Germany.

that our emergence from that backward stage has begun to influence the conditions in which the emancipated generations have to function. Opponents of reform and mitigation of the existing unsatisfactory law seem to make no allowance for the highly complicated, many-sided, multi-coloured and every-wise sensitive state, wherein marriage consists among the modern generations who have emerged from the animal stage. In the course of our investigations we have noted how the low conception of the status of women influenced the law to the disadvantage of wives, and how the changing view of women's rights has caused some attempt to right the wrong. It is true that the practical disadvantages which women suffered under the Canon Law remained in large measure under the new statutory legislation. But whereas the earlier systems assumed the wickedness of women, the new legislation of the later 19th century expressed the current estimate, in which woman was regarded not as a wicked harpy, but as at once an angel and an inferior wit. Wives began at a disadvantage under statute, but their position is seen to have been improved as time passed both by the new enactments of the legislature and by the interpretations of the Court. The claims of the new woman steadily became strident, and her emancipation progressed from inferiority to equality. Although wives had to wait until 1923 for the right to petition for dissolution on the ground of adultery alone, the divorce of an adulterous husband had been made easier for them as early as 1884, when it was enacted that failure to comply with a decree for restitution of conjugal rights should have the same effect as desertion for two years.

In lesser causes than dissolution a nominal equality grew into a feminine gain, which has succeeded at certain points in giving to women some ill-advised and unfair advantages: ill-advised because they provide only the remedy of separation and celibacy (with the possibly adulterous accompaniment of that condition)—and this on many more grounds than are available to married men—instead of the opportunity of a new alliance in lawful wedlock, which is actually needed; and unfair, because they enable women to prey upon the resources of men who are committed to this involuntary celibacy within the married state. To these undue advantages may be added the maintenance of wives, after decree of divorce or nullity, by their *quondam* husbands, even when they have re-married and can properly claim to be maintained by their

new husbands (*vide* Book I, Chapter VI.; Book III, Section I, Chapter III).

Where the legislature has exhibited a really progressive spirit, and has equalized the sexes in their right to petition for dissolution on the ground of adultery, the true value of the new facility for women is not simply the fact that women can obtain a divorce for a single act of adultery on the part of a husband. Its true significance is that women are on an equal footing for the purpose of terminating a temperamentally and sexually (i.e. psychically and spiritually) unfruitful failure of a marriage, of which the act of adultery is the formal symptom and the legal ground of dissolution. Whereas increased facilities for separation tend to be unduly favourable to women, increased facilities for dissolution are seen to match the new sexual and educational equality. For lack of such facilities, and under the influence of the absurd system of permanent separation which we have examined, prostitution, or some adulterous union, is likely to overtake young married but separated couples. And whether such relations be promiscuous or only monogamous, they must be accounted a defiance of Church and State. Many people do thus defy both Church and State—almost inevitably in the present state of the law. Yet they recognize the statutory morality, and therefore avoid as far as possible a bastard progeny. There again great mischiefs attend the failure of the law to give adequate relief. Some persons who might produce sound and healthy citizens take steps beyond their economic needs to curtail reproduction; and in the lower strata of society the restriction is effected by the widespread but criminal practice of abortion.

Such are among the consequences of the refusal to reform the law in Matrimonial Causes—separation, illicit union and all that follows. Such is all that the law can offer; and if ecclesiastical influence continues to weigh with the legislature, this is all that the law will offer either to a man whose wife has made his home a misery but has given no evidence of adultery, or to a woman who cannot trace her missing husband and prove him an adulterer, and whose resources are such that prostitution—or a lucky strike in illicit monogamous union—is the hope of her own and her children's maintenance. The man in the one case and the woman in the other might make a happy and respectable marriage if they could gain their freedom from the tie of an empty one. Yet in

the name of Christianity the Church applauds the merits of the judicial separation as the last word in relief.<sup>1</sup>

On this principle an ecclesiastical society, the Mothers' Union, made a rule not to admit to its membership any woman who had been divorced. This is plainly due to the sacramental view of indissoluble marriage, not to the fact that the ground of divorce is adultery; for otherwise there is no rational principle for the opposition to new grounds of dissolution whereby marriage could be dissolved for other reasons than sexual immorality, e.g. desertion. Yet this society has more recently been organizing machinery with a view to concentrated opposition to any Parliamentary Bill for the extension of facilities for divorce. It is clear, although it may not clearly have been realized, that to maintain the present law unaltered is to put a premium on adultery, and so to damage the true interests of sexual life. When the Central President upholds 'unbreakable marriage,'<sup>2</sup> it is plain that a fair description of the ideal marriage—indissoluble because the parties themselves do not desire dissolution—is identified with that legal indissolubility whereby parties who are at enmity must be tied for life (unless they commit adultery in the requisite conditions to satisfy the law, in which case this society will tolerate only a permanent separation, for which also cruelty or desertion would provide ground). Thus the Mothers' Union is properly committed to Dr. Lacey's position that marriage is the equivalent of relationship by birth within the family (*vide* Book III, Section I, Chapter III).

The real fault in this zealous and obstructive agitation lies not entirely with the deluded individuals who persist in advertising the cruelty of Christianity. It is that, thanks to the long reign of the Canon Law through 800 years in this country, the English people has drunk in the ecclesiastical prejudice; and even pious Protestants and respectable Free-thinkers, who are ready to cry 'No Popery' on any provocation about some silly ceremonial, yet show themselves, on this far more vital issue for the national life, to be Roman Catholics at heart. The Church at present is but little disposed to countenance a measure of reform which will do justice. During the session of the Royal Commission on Divorce and Matrimonial Causes, the then Archbishop of

<sup>1</sup> Cf. e.g. Evidence of Dr. Gore (then Bishop of Birmingham), Royal Commission; *Evidence*, Vol. II, Q. 21,305 ff., 21,378 ff., 21,451 ff.

<sup>2</sup> Speech to the Central Council, June 1931.



York, one of the Commissioners under the presidency of Lord Gorell, and one who afterwards signed the unfortunate Minority Report, preached a University Sermon at Cambridge in the hearing of the present writer. Therein, doubtless with some of the evidence given before the Commission in his view,<sup>1</sup> His Grace recounted some of the hardships of sufferers under the present law, which apart from the one existing ground of dissolution he would apparently identify with 'the Christian law.' He said: 'It is impossible to question the reality of the hardships which the Christian ideal involves. They are more true and more bitter than many realize who have no opportunity of coming into contact with them. It is impossible to doubt the genuineness of the sympathy which seeks to relieve them. . . . The Christian law ties the man for life to an imbecile woman . . . a woman to a man sentenced to penal servitude or a slave to intemperance, with all the misery and cruelty involved.' Had the Most Reverend Prelate been briefed for these sufferers, or for many of the witnesses before the Commission, he could not in a few short sentences have given a better impression of the urgent need of relief or of the altogether admirable object of the witnesses. But his sermon showed that his argument was hostile to that idea of common humanity. His version of Christ's Religion assumed the endurance of hardship as the ideal; and if he would allow to an ill-used wife the escape of a permanent separation from the 'debaucheries and ill-treatment of her lord' (to recall the phrase of one of the Christian Fathers), he would certainly disallow her re-marriage to another husband in the hope of happier life. Twenty years later, with an experience of matrimonial causes among those who can command the resources of the law, and a further knowledge of the outlook and attitude of the toiling masses, the writer can testify to the hope and expectation, now nearly dying of disappointment, that the Christian Church will rightly use its influence for the relief of the vast distresses of sexual life, and for the larger illumination of the poor. To refuse to face the facts of life, and to perpetuate the sorry system of permanent separations, is to assume that the true interpretation

<sup>1</sup> If the memory of the present writer serves aright, His Grace mentioned the testimony of many of the witnesses to the need for the relief of matrimonial distress; but this does not appear in the text of the sermon, as published in the *Cambridge Review*, June, 1910.

of Christianity lay with the corrupt mediaeval authors of the Canon Law; but it is impossible to credit the Founder of Christianity with any contemplation of a perversion so cruel and so gross.

Our present system is begotten of the animal stage in human civilization; but as men and women move further from that stage, and the development of the erotic personality carries them to a larger outlook, they will demand a more civilized system in the search for the true marriage. The extension of the practice of birth-control, and the spread of the knowledge of the more aesthetic and more healthy methods, are potent factors in this process. Since this practice enables men and women to realize the full meaning and purpose of marriage, of which the procreation of children is but a part, it will consolidate the true marriages. It will avert those disruptions which might easily destroy a marriage before it had realized the ideally happy blending of personality and the full and free blossoming of individuality within the bond of love. At the same time it will permit a rise in the standard and purpose of marriage, and inspire men and women so to pursue the ideal which marriage promises that they will demand divorce on the genuine and destructive grounds of failure, which will give them freedom to re-marry in the light of new knowledge and experience. This will not necessarily mean more divorces, but rather divorces on their true grounds. It is quite within the possibilities that in the long run the new knowledge will mean fewer divorces, for men and women will marry with greater knowledge of the meaning and purpose and promise of marriage, undertake the responsibilities of marriage with enlarged understanding and assurance, realize a new freedom through the substitution of love for that conception of law which is best expressed in the *tabu*, and build a much more truly Christian institution on the ashes of a discredited tradition.

NOTE.—Since the above chapter was written, Mrs. Janet Chance's challenging volume, *The Cost of English Morals* (which bears sharply upon these issues) has been published, and deserves to be widely read.

## CHAPTER II

### EASIER DIVORCE EXONERATED FROM EVIL EFFECTS

The belief, expressed at the end of the last chapter, that the new understanding of sex and the reform of the law in the interests of greater liberty of divorce will improve both the happiness and the morals of marriage, might seem to require some evidence to support it. If such argument is not strictly relevant to a legal thesis, it may well be necessary to assist the formation and development of the public opinion on which, in the long run, legal reforms will depend. Some arguments are therefore requisite at this point, alike historical and current, and supplementary to the earlier historical chapters which were mainly concerned with the recitation of fact, to indicate that a large liberty of divorce does not necessarily produce a larger number of divorces, and that a rigid refusal of divorce does not promote good morals, that sexual vice is not an inevitable corollary of sex equality, and that an increase in the number of divorces does not necessarily mean a decline in morals.

With the whole of history for our field, it will not be easy to be brief; but perhaps the following examples in ancient and modern times will suffice.

Following the emancipation of women in ancient Babylon and Egypt, and the more qualified liberties of wives in Greece, the development of the Roman Civil Law towards equality of the sexes in marriage occupied the first chapter of Book I. There we stated the Law of Marriage and Divorce and the nearly equalized conditions of husband and wife, after the decline of the old ceremonies and procedure through which a wife passed *in manum*. This approximate equality was in process of attainment in the late Republic and the early Empire, and the emancipation of married women reached its height in the Age of the Antonines. Yet it is the case that in that same age the signs are apparent that the decline of ancient Rome had begun. Nothing is easier than to assume, under the influence of the early Christian reaction against Roman life and of the prejudices inherited from the long reign of the Canon Law, that the lax conditions of Roman marriage caused the collapse of the Roman Empire. In other words, disin-

tegration of the ancient Roman family commonly bears the blame for the racial degeneration which made the great Empire an easy prey to the barbarian hordes.

It is a not uncommon habit of those who champion the matrimonial restrictions of the Christian Church to decry the early centuries of the Roman Empire as a period of unparalleled vice or a prolonged orgy of matrimonial promiscuity. There are certainly some examples of excessive licence. Lecky quotes the classic cases in his *History of European Morals*, and concludes with these:

'Martial speaks of a woman who had already arrived at her tenth husband; Juvenal, of a woman having eight husbands in five years. But the most extraordinary recorded instance of this kind is related by St. Jerome, who assures us that there existed in Rome a wife who was married to her twenty-third husband, she herself being his twenty-first wife.'<sup>1</sup>

These cases suggest an admittedly scandalous variety which would not have been possible under stricter laws. But if the laws had been stricter, it is highly probable that the first marriages would never have taken place, and loose and changing attachments would have served. Divorce was not the cause of laxity. In so far as the age was lax, which is far from being clearly established, a law of divorce by mutual consent would merely allow within marriage such laxity as was the note of the age. Legal indissolubility of marriage would not have mended morals. It would only either have prevented large numbers of people from entering into formal marriage, or have promoted sexual immorality on the part of married persons. Lecky as an historian is a sympathetic observer of Christianity, and is not likely to err on the side of leniency in his review of ancient Roman morals. Yet he refuses to allow the charge that marriage under the Roman Civil Law was uniformly or even generally on the level which some flagrant cases might suggest. Indeed, he cites on good authority an equal number of marriages of such genuine affection that the death of one party led to the immediate suicide of the other.<sup>2</sup> Havelock Ellis, in his *Studies in the Psychology of Sex*,<sup>3</sup> is of opinion that the system of consent was wholly salutary, and that it is a mistake to suppose

<sup>1</sup> Vol. II, p. 307.

<sup>2</sup> *European Morals*, Vol. II, pp. 308-311.

<sup>3</sup> Vol. VI, p. 396.

that Roman women of the late period were given up to licence; and he quotes other authorities in support. Thus Hobhouse concludes that Roman women worthily retained the position of their husbands' companions, counsellors and friends.<sup>1</sup> Dill, a recognized authority on Roman Society, states that the Roman woman's position, both in law and fact, rose during the Empire; without being less virtuous or respected, she became far more accomplished and attractive; with fewer restraints, she had greater charm and influence, even in public affairs, and was more and more the equal of her husband. 'In the last age of the Western Empire there is no deterioration in the position and influence of women.'<sup>2</sup> Donaldson holds that there was no degradation of morals in the Roman Empire; 'the licentiousness of pagan Rome is nothing to the licentiousness of Christian Africa, Rome and Gaul, if we can put any reliance on the description of Salvian.'<sup>3</sup> If Salvian's description of Christendom is probably exaggerated and one-sided, Havelock Ellis contends reasonably that 'exactly the same may be said in an even greater degree of the descriptions of ancient Rome left by clever pagan satirists and ascetic Christian preachers.'<sup>4</sup>

When ecclesiastical historians and apologists for the Catholic Church contrast the rule of indissolubility of marriage in the Mediaeval Church with the changing matrimonial associations of the Roman Empire, they forget, or ignore, the point of true comparison which lies between the achievement of sexual equality in ancient Rome and the suppression of women under the Canon Law. Whereas, in the free conditions of the Roman Civil Law, many genuine and happy marriages were made without the advantage of Christian illumination, the new rule of indissolubility of marriage, under the severe restrictions of the 'Christian' Canon Law, inaugurated conditions of incredible corruption. This nominal rule enforced the condition of unhappiness where the parties were poor and unprivileged, and yet provided for such an array of grounds of annulment that marriages were broken with a freedom which would match the worst days of ancient Rome. Marriage and divorce under the Roman Empire, without the advantage of Christianity, were not worse than marriage and annulment in the mediaeval Church under the rule of the Vicar of Christ. There is a parallel in the history of persecution. It is

<sup>1</sup> *Morals in Evolution*, p. 216.

<sup>2</sup> *Roman Society*, p. 163.

<sup>3</sup> *Woman*, p. 113.

<sup>4</sup> *Op. cit.*, p. 397.

commonly suggested that Christianity survived in spite of every effort of the Roman Empire to stamp it out. But that is not the case. Had the Roman Emperors applied a systematic and continuous persecution to the Christians, Christianity in the Empire would have been exterminated. The persecutions, often cruel and vicious when they were applied, were actually undertaken only at rare intervals, and the Christians often enjoyed encouragement at the hands of the pagan Emperors. The imperial persecution of Christians was by comparison no whit worse than the cruelties of the Church when it had power enough to impose its discipline upon the unbeliever and the heretic.

It is well that, when recording the features of a system, we should make adequate allowance for the conditions. On the grounds of actual immorality and corruption there is probably not much capital to be made out of the controversy between the respective champions of the Roman Empire and the Mediaeval Church. But if we have regard to their respective professions and intention and aim, we shall admit that the ancient Romans did, at the inevitable cost of some abuse, achieve a certain ideal matrimonial relationship which we have still to recover. The argument that the decline and fall of the Roman Empire was caused by corrupt social morals is too easy; and, if this could be proved, it would not follow that the indictment included the legal provision of divorce by mutual consent. Although any satisfactory solution of the problem of Rome's fall seems to be veiled by the clouds which conceal the 'elemental springs of national destiny,' the conditions of Roman life suggest immediate explanations with which matrimonial life has only the most indirect and in no wise necessary connection. Indeed, it would appear that the principal immediate cause was economic; and this so far from being due to corrupt conditions, which are commonly confused with the evolution of marriage, was rather the cause of them.

The later familial phase, which we now observe in modern Europe and America, arrived in Roman history before the social and economic systems were ready to bear it. The oppression of subject classes in the newly extended Empire, the concentration of wealth in the hands of far too few families, the system of capitalism still in its early infancy, the hopeless outlook of the proletariat—these factors deprived the race of its former vitality. The ruling class in the later Empire, even under the Christian

Emperors, failed to realize that all was not well with the body politic; and at the end of the 4th century, hardly more than fifty years before the onset of Attila and the Huns, the letters of Symmachus show a complacent satisfaction with the best of all possible worlds.

'Empires die,' wrote Lord Bryce in his *Studies in History and Jurisprudence*, 'sometimes by violence and sometimes by disease. Frequently they die from a combination of the two, that is to say, some chronic disease so reduces their vitality that a small amount of external violence suffices to extinguish the waning life. It was so with the dominion of Rome.'<sup>1</sup>

In evidence of this he cites factors which reinforce the argument: corrupt administration of some provinces, oppression of humbler classes, diminution and military decline of the population in some regions, inadequate revenue.

'But it seems pretty clear,' he concludes, 'that the armies and the revenue that were at the disposal of Trajan (*ob. 117*) would have been sufficient to defend the Empire three centuries later, when the first fatal blows were struck; and we may therefore say that it was really from internal maladies, from anæmia or atrophy, from the want of men and the want of money, perhaps also from the want of wisdom, rather than from the appearance of more formidable foes, that the Empire perished in the west.'<sup>2</sup>

In the meantime the Christian Church had given the comfort of its creed and its hope for the future to the despairing proletariat, and, while it converted the barbarian invaders of the Empire and kept the torch of civilization burning through the dark ages, the effect was on some counts reactionary. The great achievement of the Roman Civil Law with which we are especially concerned,

<sup>1</sup> Vol. I, p. 68.

<sup>2</sup> *Loc. cit.*, p. 69. Cf. *The Problem of Decadence*, by Gamaliel Milner, M.A. (Williams & Norgate, 1931), which contains a scholarly and stimulating enquiry into the circumstances and causes of the fall of the Roman Empire. The author cannot be said to leave the enigma more than partially resolved. But he writes both with Christian conviction and with sympathy with classical Rome, and concludes that 'the downfall of ancient civilization was caused by, or rather was the outward form of, something that took place in the soul of man.' A particular example was that 'slavery was the economic basis of ancient society, and Christianity, implicitly if not explicitly, condemned slavery' (pp. 20, 23). This would seem to be a much truer and more radical index than is provided by the common argument that the cause of the fall lay in the decay of the family. To this we proceed in the next paragraph.

the advanced system of marriage and divorce, went the way of the less creditable features of the Empire, and has quite unfairly borne the blame for the catastrophe. 'It was *not* the disintegration of the ancient patriarchal family,' writes Dr. Muller-Lyer,

'that caused the fall of Rome or of the other empires of antiquity. It was the *concentration of wealth in the hands of a few*. The too rich minority degenerated in irresponsibility and excess. The too poor and immense majority in misery and servility. That ancient society was like an organism smitten by some strange disease that drove all the life-blood to one organ, congesting and putrefying it, while all other parts and functions atrophied in anæmia and lethargy.

'So when the Teutonic peoples, rough barbarians but full of primitive vitality, fell upon the provinces and swarmed in hundreds of thousands across the frontiers, the Empire collapsed like a rotten tree at a few sharp strokes of the axe. *The dissolution of the family itself was no symptom of decay; on the contrary it registered an advance which . . . was entirely in harmony with the trends of evolution.* In what, may we ask, did this much lamented "disintegration" consist? In the emancipation of women and children from the irresponsible—and often malignant—power of the heads of households; in the amelioration of the conditions of slavery; in the supersession of a barbarous situation of absolute authority and absolute subjection by a more truly humane and parental relationship. But while Roman geneonomic and social conditions improved, the *cancer of economic unbalance and injustice* grew and spread. This was the fatal factor that broke the power of Rome and sapped its vitality and that of the whole antique world. Progressive ideals and institutions *did nothing but good* in evolving something nobler and tenderer out of the ancient Roman Patriarchate.'<sup>1</sup>

And again, comparing the late familial phase in ancient and modern times, the same author writes:

'The individualism of later antiquity was premature and foredoomed, lacking an adequate economic foundation'; whereas 'our (20th century) industrial institutions and resources are two full stages ahead of Imperial Rome; and a much more extensive and elaborate organization of production can afford to "carry" a much freer and more varied type of family.'<sup>2</sup>

The Great War, which shortly followed the publication of the book from which we quote these paragraphs, has left its ill-effect upon the economic security of the Western World; but the later

<sup>1</sup> *The Family*, translated by F. W. Stella Browne in 1931, pp. 211, 212 (italics in the original).<sup>7</sup>

<sup>2</sup> *Op. cit.*, p. 319.



familial phase continues on its evolutionary course, and, if in England it has not yet burst the bonds of the inherited marriage laws, that is only because the law is more elastic and adaptable, in sometimes undesirable ways, in practice than in profession. But the 'much freer and more varied type of family' need not be interpreted in the sense of wholly illicit associations, which popularly are called 'free love,' but is rightly to be understood to mean freer conditions for the mating of the right people. This freedom may involve some restrictions in its own interest; and these will be directed to the prevention of the easy contraction of marriages which are spiritually and eugenically unsound. But this freedom will imply also an ordered system of divorce as the cure for the disease of biological and spiritual misalliances, when the improved conditions of the later familial phase have failed to prevent them.

The Roman system of marriage and divorce was so far in advance of its time that nowhere has it been recovered in its entirety;<sup>1</sup> but the influence of the Christian Church, valuable in a variety of ways, was reactionary where it might have been cooperative. The Roman system, through its progressive emancipation of women, fulfilled much of the ideal of Christianity which could not find adequate expression in the more backward conditions of Judaism; but it appears to have lacked just that element of restraint and safeguard which Christianity could have given to the Roman life by the contribution of a new spirit instead of a new law. Yet when the Empire became Christian it must needs reform the law; and, so it fell out, the barbarian invaders of the Empire understood a system of legal discipline better than the preaching of idealism in a state of freedom. Thus the matrimonial legislation of Justinian, although in part repealed by his successor, Justin II, may be said at once to have disciplined the invading barbarians and to have given an incentive to the new internal barbarism which was to distress for many centuries the life of Europe. Although the Canon Law, as a distinct body of law, could hardly have taken shape earlier than the collection of Dionysius Exiguus in the 6th century, it had long been incipient, and its formulation gained encouragement from some of the Christian Emperors. It

<sup>1</sup> The nearest approach is furnished by the new Code of Soviet Russia, which has reproduced something very like the *divortium communi consensu* and the *repudium*, but without the safeguards which are requisite for the restraint of such a system from abuse (cf. Book III, Section I, Chapter VII (iii)).

was easy for the matrimonial provisions of Justinian, although strictly in the sphere of the Civil Law, to be regarded retrospectively as being in a sense canonical legislation. Sir Henry Maine writes of these provisions: 'But the Chapter of Law relating to married women was for the most part read by the light, not of Roman, but of Canon Law, which in no one particular departs so widely from the spirit of the secular jurisprudence as in the view it takes of the relations created by marriage.'<sup>1</sup> It is of the essence of our thesis that this departure was excessive in fact and deplorable in effect. When Sir Henry Maine adds that 'this was in part inevitable, since no society which preserves any tincture of Christian institution is likely to restore to married women the personal liberty conferred on them by the middle Roman Law,' he is clearly writing under the influence of the age, i.e. the second half of the 19th century, when the new Matrimonial Causes Act of 1857 was beginning to be applied in the Court under the same restrictive influence. For why should the Christian religion more than others, apart from incidental conventions, restrict the liberties of wives? If, by a 'tincture of Christian institution,' he means the semi-popular superstition which has been fed by perverted history and factitious ignorance, it is unlikely that that tradition will favour any return to the enlightened system of the great days of the Roman Empire. But, subject to certain precautionary measures which the Roman system lacked, a reform of the law in Matrimonial Causes, on the basis of sex equality and mutual consent, would not be inconsistent with a Christian humanism which embraces both the virility and the charity of the Christian Gospel. When Sir Henry Maine adds, 'but the proprietary disabilities of married women stand on quite a different basis from their personal incapacities, and it is by keeping and consolidating the former that the expositors of the Canon Law have deeply injured civilization,' his words might be thought to be a sufficient condemnation of the Canon Law. We should, however, condemn the Canon Law on both counts. For on both counts its influence survived too long to the detriment of justice.

Although the Married Women's Property Acts have now greatly increased the economic independence of married women who possess property, or earn an income or profits, of their own, and have thus corrected some measure of the injustice which

<sup>1</sup> *Ancient Law* (Routledge), p. 131.

women suffered under the Canon Law, we know that the Canon Law survived in the principles and the practice of the law in Matrimonial Causes; and there our contention is that that influence is not only excessive but, for the most part, actually mischievous. In history the Canon Law doctrine of the indissolubility of marriage allowed the termination of a marriage only by annulment, and this was strictly not termination but obliteration. This, however, did not prevent irregular unions and an excess of sexual immorality, which its device of permanent separations, without divorce and re-marriage, obviously would, and actually did encourage, and which divorce proper would in a large measure have prevented. It is true that it stands to the credit of the Canon Law that it insisted on consent as a basis of marriage, without requiring for many centuries the external legal form which has so greatly tended to change the emphasis; but it added the condition of copula to that of consent, and caused the validity and the indissolubility of marriage to turn, not on the affection of the spouses, but on the completion of carnal coition. Thus the maintenance of the legal form of marriage, when not otherwise shown to be void, came to depend on the sexual capacity of the parties. Incapacity would serve to annul a marriage, but deadly hatred would not avail to make an end of a marriage which had been consummated. This indissolubility of legal marriage was hostile to the formation of real marriage, and promoted irregularity. Wives were kept in seclusion and subjection, but husbands were not debarred from the enjoyment of informal 'wives' without the imposition of any obligation towards them. Although present conditions are not so crude as this, the relics of the system are with us still, and the difficulty of divorce actually adds to the sexual immorality which a more comprehensive law of divorce would avert. It is a legacy of the Canon Law which now puts a premium on sexual vice as the sole way of escape from a marriage which has failed for quite other reasons. This raises the point of the late Lord Gorell's principle that 'divorce is not a disease, but the remedy for a disease.' The 'disease' is not necessarily sexual vice at all, although it may produce this as a by-product, and, in the present conditions of the law, must show evidence of it in order that the parties who suffer from the 'disease' may obtain relief. We have noted the common superstition of the opponents of Divorce Law Reform that an increase in the number of divorces

means a decline in sexual morals. The purport of that argument is that smaller facilities for divorce would ensure a higher standard of sexual morality. But there is, of course, no necessary connection, because, if divorce were obtainable on the grounds of cruelty or desertion, and were so obtained, there would then be no evidence of any sexual offence. To-day in England it is only a half-truth to say that divorce is the evidence of defective sexual morals, because the true cause of matrimonial breakdown is frequently not the adultery of either of the parties. The cause may, of course, be some sexual incompatibility or some form of unsatisfactory sex-life; but the adultery is rather a consequence of this underlying incompatibility, or an occasion either promoted by such unsatisfactory conditions or staged in order to satisfy the requirements of the present law. Under a law reformed to include, e.g., desertion or cruelty as grounds for dissolution, these might equally serve as such occasions, when the real cause of matrimonial failure was some fundamental incompatibility. But it is clear that the more in number the statutory grounds, the less the likelihood of collusion.

In any event, even in the conditions of the present law, a larger number of divorces does not necessarily mean a larger amount of sexual immorality in the sense that such conduct is habitual or a positive indication of the moral degeneration of the race. For, first, a larger number of divorces may point only to the number of those who have long been in their present difficulties, but for whom facilities for escape have only lately been provided, as for example by the Act of 1923, which enabled wives to obtain a divorce on the ground of their husband's adultery without the addition of cruelty or desertion; secondly, it may mean merely that people are more enlightened or more courageous, and that they are ready to avail themselves of such facilities as the law provides for the dissolution of unhappy marriages, instead of either allowing their lives to be stunted by domestic unhappiness, or living in clandestine or open illicit relationships; and, thirdly, it may mean only what we have suggested, viz., that persons whose marriages have broken down for other reasons are driven to adopt unwillingly the only course of escape and re-marriage which the law allows; and it is quite unjust to accuse them of sexual immorality, at least in the accepted sense of the term. While the Legislature denies divorce on any other ground than adultery, it

may be said to enlarge the sum of adventitious sexual immorality, or else to encourage the bad device of fictitious proof and 'camouflage.' If divorce were granted on other grounds, the Courts would furnish far less evidence of such misconduct as is conventionally assumed to be at the root of every divorce. Again, an extension of the grounds, as distinguished from an enlargement of the facilities on the existing ground (which last is the measure of the reform of 1923), is not found to enlarge the amount of sexual immorality in countries where various grounds are valid. The refusal of divorce means that legal form is given to unreal unions, but facilities for divorce enable unreal unions to be terminated. Where marriages are unreal and without affection, they tend to encourage illicit associations on the part of married people; but where some freedom of divorce exists, the tendency is to use the facilities for the termination of unreal marriages and in some measure for the substitution of genuine ones. Where the ground for divorce is limited to adultery, as in England, it drives the victims of unhappy marriage to sexual immorality as the sole means of escape; but, where larger grounds are provided by the law, divorce ceases to be the index of sexual immorality (as it is now commonly assumed to be) because it is then obtained on the real ground of failure, which frequently is not adultery at all. Moreover, where divorce is difficult, or disallowed altogether, the insistence on the legal union of incompatible couples encourages extra-matrimonial unions unrecognized by both Church and State.

The mention of incompatibility at once takes the minds of many people to the reported freedom of divorce in America. As will be seen in Appendix II at the end of this book, where the grounds of divorce in other countries are set out, the grounds in the United States of America vary considerably in different States. The general liberty is, however, greater than in England; and the great majority of divorces appear from statistics to be given on the grounds of cruelty and desertion, and only a small proportion on the ground of adultery. Where the grounds of divorce are very precisely defined, there is always in practice some legal circumvention and interpretation; and, where incompatibility and mutual consent are not admitted as formal grounds, it is impossible entirely to exclude their influence in promoting suits. In England the Law, with the connivance of the Church, encourages adultery; and the bars to relief, which are the legacy of the Canon

Law, only mean that mutual consent and incompatibility must be carefully concealed beneath an apparent antagonism on a ground which is often artificial. In America the grounds of cruelty and desertion come to the rescue to render escape more self-respecting.

The modern emancipation of women is a prime factor in the revolt against the sham of unreal unions, and the women's movement has advanced further in America than in England. Before the War it was held that the prevalence of divorce in America was no evidence of a low grade morality, for, in the opinion of Professor Munsterberg, the real ground which mainly led to divorce in the United States was the highly ethical objection to continuing externally in a marriage which had ceased to be spiritually congenial. 'It is the women especially, and generally the very best women, who prefer to take the step, with all the hardships which it involves, to prolonging a marriage which is spiritually hypocritical and immoral.'<sup>1</sup> Although divorce proper is distinguished from Canon Law 'divorce' in that it carries the right to re-marriage, it is to be noted that further marriage is by no means the invariable sequel. According to Dr. Walter Francis Willcox, writing in the *Encyclopaedia Britannica* (14th edition), the indications of such statistics as are available in the United States seem to show that the number of persons who re-marry is about one-third of those who obtain divorce, and the rate probably corresponds with that of widows and widowers of the same age. Similarly the figures for Switzerland, Holland, and Berlin show the proportion of re-married *divorcés* to be much the same as that of re-married widows and widowers.<sup>2</sup> While, then, the value of divorce proper is that it terminates marriage and permits re-marriage, and a substantial minority of divorced persons avail themselves of the right of re-marriage, the fact that a majority of divorced persons, also corresponding with widows and widowers, do not proceed to re-marriage shows that there is no obvious abnormality about those who go through the Divorce Court; and some of our evidence would suggest that if *divorcés* were in any sense abnormal, their principles are abnormally high. Further than this, with the rise of women's rights and independence, the protective attribute assumed by the male sex

<sup>1</sup> *The Americans*, p. 575; quoted in *Studies in the Psychology of Sex*, Vol. VI, p. 459.

<sup>2</sup> Vol. VII, p. 460.

breaks down; and many women have ceased to desire a protection which was the sign of servitude and deprivation. The justice of women's right to divorce on the ground of a single act of adultery may, of course, be qualified by the biological consideration that the adultery of a husband is not charged with the same possible consequence as is that of a wife, and on that count the wisdom of the Legislature in 1923 has been questioned. But in the long run sexual equality must be maintained, and under a reformed law adultery would cease to be the only, or even the chief, ground for dissolution of a marriage; and the greater the liberty of divorce, the smaller would be the incentive to sexual immorality when the marriage goes awry. Thus the contention that the extension of grounds for divorce would necessarily increase the number of divorces cannot be sustained, and still less that such extension would necessarily increase the number of divorces obtained on the ground of sexual immorality. It might add to the number of dissolutions by the number of separations which it would eliminate, but that would not mean an increase in the number of petitions which deserve the decree of divorce, but only an increase in the number of persons who succeed in obtaining what they cannot obtain under the present law. The true effect would be to give decrees of divorce on the grounds which furnish the true occasion, and thus to ensure a much more accurate distribution of justice. The number of divorces, as given at present on the ground of adultery, would be greatly decreased, for practically all the collusive, or 'camouflaged,' cases would disappear. There would be an approximation to divorce on the true grounds, at least within the compass of such grounds as the Legislature might adopt.

The evidence of Scotland, where desertion has been a ground for dissolution since 1573, does not suggest that additional grounds beyond adultery produce an excess of laxity, or give facilities for the 'easiest collusion' (as feared by the Minority signatories of the Royal Commission). This ground, of desertion, appears rather to provide means for those who need facilities, but otherwise could not obtain them except by some collusive device. Lord Salvesen's evidence before the Commission was to the effect that the number of divorces in Scotland on the ground of desertion was smaller than on the ground of adultery, and that the number had tended to decrease. Incidentally in the course of his evidence he said (*Evidence*, Vol. I, Q. 6371, at p. 261):

'I always feel that I never do a more useful day's work than when I divorce half a dozen people for desertion; that is to say, give half a dozen deserted wives the right to enter into legal unions which they generally have in prospect before they bring the action; because sometimes the desertion may have continued over ten or fifteen years when the action is raised, and there is generally some motive, the motive being that they wish to enter into a legal and respectable union.'

To those, of course, who regard the sacramental tie of marriage as being all-important, all facilities for divorce, and any extension of those facilities, together with the corollary of re-marriage, appear as evils. The recorded examples of frequently changing alliances in Ancient Rome, even if they were not truly typical of Roman marriage, readily lead to a condemnation of the system which allowed them. But there is no evidence that the later restrictions of the Canon Law promoted any improvement in sexual morals. On the contrary, as we have seen, the doctrine of indissolubility encouraged illicit unions, which, while respecting the letter, violated the spirit of the so-called Christian 'law'; and the influence of the same doctrine to-day not only bars the relief of divorce where it is needed, but denies divorce on any ground other than sexual offence, and is responsible for some hundreds of thousands of separations which enforce a nominal celibacy, without guarantee of its observance in fact. It is the desire of Divorce Law Reformers to correct this hypocrisy by increasing the possibilities of real marriage in contrast with the present premium on the formal marriage of incompatible, or of legally separated, spouses. A large liberty will sustain the stability of the institution of marriage. In present conditions in England marriage tends to fall into some disrepute; but the object of Reformers is to transform marriage from the state of enforced bondage, from which adultery offers the only escape, into a self-respecting union in a state of liberty. The permanence of marriage as an institution is, of course, highly desirable, and as Dr. Havelock Ellis argues, there is no adequate evidence of its decay—even though the rigorism of the Church does not greatly commend it to the realism of the age. He has no liking for divorce in principle—indeed, it can hardly be said of any reformers that they 'like' divorce—but recognizes its constructive value in practice; and in his paper written for the Fourth Congress of the World's League for Sexual Reform he faces fairly the destructive influences and provides the answer:



'The ever increasing approach to sexual and industrial equality of the sexes, the steady rise and extension of the divorce movement, the changed conceptions of the morality of sexual relationships, the spread of contraception—all these influences are real, probably permanent, and they have never been found at work before in combination, seldom even separately. Not one of them, however, when examined with care, bears within it any necessary seeds of destruction. On the contrary, they are adapted to purify and fortify, rather than to weaken, the institution of the family, to enable it to work more vigorously and effectively rather than to impair its functions as what has been termed "the unit of civilization." It is true that the younger women of to-day are often dissatisfied with marriage, but that attitude is a belated recognition that they are entitled to satisfaction, and we may accept it as wholesome. The greater economic independence of women assists them in the task of sexual selection and is found to be conducive to marriage, though it is also favourable to divorce when marriage is disrupted.'

This last sentence points precisely to the principle which we have maintained, viz., that divorce is not the evil but the remedy, that divorce only gives legal effect to the moral dissolution which a marriage has already suffered, and that the true solution lies not in the limitation of divorce but in the better understanding of marriage.

<sup>1</sup> *Birth Control Review*, June, 1931, p. 166 (quoted from a forthcoming volume, *More Essays of Love and Virtue* (since published), *vide* p. 25). The author mentions (at p. 73) the testimony of two American Doctors of Medicine who have personally observed the new conditions in Russia. The articles of these authorities, in the *Journal of Social Hygiene* for November, 1930, deserve a careful reading: Dr. Rachelle S. Yarros at pp. 449-464, and Dr. Ralph A. Reynolds at pp. 465-482. It appears that, contrary to prevalent beliefs and prejudices, the new facilities for divorce in Russia are not abused, and are accompanied by an official disapproval of libertinism, a restraint of prostitution, and a progressive system of social hygiene especially directed to the prevention and cure of venereal disease.

*BOOK IV*

A RATIONALE OF REFORM



## SECTION I

### ANNULMENT

#### (i) JURISDICTION

We have remarked<sup>1</sup> the tendency to establish the more exacting test of domicile instead of the place of celebration of the marriage or of residence, as the test of jurisdiction in suits for nullity, and accept the fact that domicile is now the test of jurisdiction in a suit for nullity on the ground of impotence. The decision in *Inverclyde (otherwise Tripp) v. Inverclyde*<sup>2</sup> has had the same effect on suits for nullity on the ground of impotence as that in *Le Mesurier v. Le Mesurier*<sup>3</sup> had on suits for dissolution. Although this may seem to be restrictive of relief, it was apostrophized by the learned Counsel for the respondent in *Inverclyde's* case as 'the living growth of English Law.'

In our enquiry into the 'Difficulties of Domicil' we admitted that much may be said on legal grounds for the tendency towards the assimilation of the jurisdiction in suits for nullity to that of suits for dissolution; but we urged that, in view of the fact that domicile as a test of jurisdiction is exceptional among civilized countries, and that the test of residence is generally established, the process of assimilation should be reversed; that the test of jurisdiction in suits for dissolution could with greater efficiency and convenience be assimilated to that which under the old practice was sufficient in suits for nullity. This is properly treated under the question of jurisdiction in suits for dissolution. But here we should advocate the reform proposed by the Royal Commission, Majority Report, viz., that in the case of a marriage in England, valid by the *lex loci contractus*, but pronounced void by the foreign Court of domicile, the decree of nullity could consequentially be pronounced by the English Court. This reform would enable the Court to relieve the extraordinary disabilities and embarrassment which are possible under the English law of domicile, and actually arose in the classic case of *Ogden v. Ogden*.<sup>4</sup> It may be that the decision

<sup>1</sup> Book II, Section II, Chapters II and III (i); Book III, Section I, Chapter VII.

<sup>2</sup> [1931] P. 29; 47 T.L.R. 140.

<sup>3</sup> [1895] A.C. 517.

<sup>4</sup> [1908] P. 46.

and *dicta* in *Salvesen's* case<sup>1</sup> would, in a case similar to *Ogden's*, lead the Court to accept the decree of the foreign Court of domicile as conclusive. In that case the proposed provision for consequential annulment would be needless.

## (ii) NEW GROUNDS

Although additional facilities for the annulment of marriage are not a very urgent need, they take their place at this point in a scheme of reform. The Royal Commission on Divorce and Matrimonial Causes, proposed five new grounds, which we have recorded in our chapter 'The Need of New Grounds.'<sup>2</sup> These we now endorse, together with the further ground which was suggested, viz., that a party to a marriage should be entitled to petition for a declaration of nullity where the other party is at the time of marriage suffering from an incurable and infectious disease, in such a form, or in such an incipient stage, that it is not detected by the first party, but can be shown within six months of marriage to frustrate the sexual and procreative purposes of marriage. The validity of this ground would be subject to the same provisions in the matter of limitations to the suit as the other proposed grounds to which they are relevant.

<sup>1</sup> [1927] A.C. 641.

<sup>2</sup> Book III, Section I, Chapter VIII (ii).

## SECTION II

### DISSOLUTION

#### CHAPTER I

#### JURISDICTION

Here the problem which invites solution is the standing difficulty of domicile which we have considered at some length both under our treatment of 'Bars to Relief,' in Book II, and under the title 'Difficulties of Domicil,' in Book III, Section I, Chapter VII (especially (iii)). Our task is to mitigate the incidence of the law of domicile in Matrimonial Causes. We now endorse the three proposals of the Royal Commission which were recorded under the last reference, and recommend that the partial adoption of the first of these proposals in the Indian and Colonial Divorce Jurisdiction Act, 1926,<sup>1</sup> be extended to meet the case of those who are domiciled in England but resident in a foreign country. This is a practical, although only partial, application of the proposal that new legislation should reverse the process by which the test of jurisdiction in suits for nullity, at least on the ground of incapacity, has been assimilated to that in suits for dissolution. The following three courses of reform invite attention:

(1) The adoption of the test of residence instead of that of domicile in Matrimonial Causes, whereby, as under the operation of the Indian and Colonial Divorce Jurisdiction Act (*supra*), the decrees of foreign Courts in the case of persons domiciled in England, but resident in the countries where those Courts have jurisdiction, would be accepted by the English Court if pronounced on a ground recognized in English Law. N.B.—The period requisite for legal residence for both parties would require statutory definition.

(2) The adoption of the test of nationality instead of that of domicile throughout the British Empire. British nationality would then replace the domicile of individual units of the Empire, and all Courts of the Empire and of Foreign Countries would be empowered to hear suits of British subjects in Matrimonial Causes,

<sup>1</sup> 16 & 17 Geo. V, c. 40.

and to give decrees on the grounds proper to their nationality. The same benefit would be reciprocal in the case of foreign petitioners in British Courts, subject to satisfactory agreement between the countries concerned. The difficulty here presented is that there is no uniform British Law in Matrimonial Causes; and, while the test of jurisdiction would be the residence of the parties, the limit of relief would still be determined by the law of the parties' domicil. If the parties are domiciled in a country where there is no divorce, but resident in a country where divorce is obtainable on one or more grounds, there would be no relief without change of domicil. If, however, residence were made the unqualified test, persons from a backward country could freely obtain divorce by going abroad; but for this facility, with the possibilities of abuse which it would carry, it might be difficult to secure the sanction of the countries concerned. Therefore this proposal, although we should wish to see its adoption on an international scale, would, at least at first, be limited to a union of the countries which were ready to enter into agreement to recognize certain grounds of divorce as being of international validity.

(3) The extension of the grounds for divorce under the English Law. This is desirable, not because the law of divorce ought to serve the interests of the law of domicil, but because the reform of the Divorce Law is our main count; and the international difficulties between this country and others do now point, and in any such scheme would point, to the backward state of the English Law, and relief would be facilitated by the greater uniformity of law in company with the adoption of the test of residence.

## CHAPTER II

# NEW GROUNDS: INCOMPATIBILITY AND MUTUAL CONSENT

### (I) PROPOSALS AND PROCEDURE

The new grounds which we reviewed in the appropriate chapter<sup>1</sup> are those which are now generally accepted by Reformers and commonly adopted in recent proposals since the Royal Commission recommended them. We endorse these grounds, viz., adultery, wilful desertion, cruelty, incurable insanity,<sup>2</sup> habitual drunkenness, and imprisonment for life under a commuted death sentence. Of the other proposals, which we considered in the same chapter (sub-section (iv)), we rejected bigamy, referred disease (with strict qualifications) to the additional grounds for annulment, and gave reasons against the adoption of unconquerable aversion and refusal to perform conjugal duties as separate grounds. These last are properly comprehended under the general ground of Incompatibility; and this, together with the ground of Mutual Consent, we shall now propose as the principal factor in any adequate and comprehensive scheme of reform.

The first proposal, then, is the introduction of a new comprehensive ground of dissolution, viz., Incompatibility, on which a suit may be defended or undefended. The second proposal is that of the ground of Mutual Consent, wherein the question of defence does not arise. These new grounds, which are new versions of the *repudium* and the *divortium* of the Roman Civil Law, would meet *inter alia* any proposals which Reformers might otherwise advance for the inclusion of unconquerable aversion and refusal to perform conjugal duties. They would greatly reduce the number of suits on the ground of adultery, and probably also those which would be brought on the newly proposed grounds of desertion and cruelty; but according to the scheme here advanced, the new facilities will be conditioned by tests and safeguards. It has been objected that Incompatibility (like cruelty) is difficult of definition, and difficult of cognizance by the Courts. That is quite true, and indeed an

<sup>1</sup> Book III, Section I, Chapter VIII (iii).

<sup>2</sup> On the conditions stated in the chapter quoted in footnote 1, *supra*.



escape from this difficulty would gladly be welcomed. But the reason which must be given to justify the inclusion of incompatibility as a ground is that mutual consent does not cover those cases of incompatibility in which only one party seeks a dissolution. Incompatibility is not an overt act which can be proved, nor is it a condition which can always positively be verified. Yet it may be said to lie at the root of the majority of matrimonial catastrophes. If incompatibility could admit of adequate proof and were established as a statutory ground, it is not improbable that it would eliminate the greater part of the offences for which Divorce Law Reformers now endeavour to establish additional grounds. It would be found that adultery itself as well as the offences which are proposed as new grounds—desertion, cruelty, habitual drunkenness—are in great measure products of incompatibility; and possibly also, in some examples, insanity and imprisonment could be traced to this radical condition. It is objected that incompatibility not only is difficult to define and to verify, but also is trivial, and may be no more than a temporary whim; and this last objection is urged also against divorce by mutual consent. But no serious reformer proposes that divorce should be given, at least with the present ease and speed, on any such trivial ground. The principles which governed the Royal Commission are sound guides, viz.:

- (1) No law should be so harsh as to lead to its common disregard;
- (2) No law should be so lax as to lessen the regard for the sanctity of marriage (*Report*, Vol. XV, p. 95).

At present there is no doubt but that the law now offends against both of these principles. It is lax for those who evade its principles but observe its formalities. But it is so harsh as to refuse relief to some petitioners who need and deserve it, and to cause disregard on the part of others who cannot formally qualify for its relief. A reformed law will therefore aim at making divorce ultimately possible for any spouse who desires it, but not so easy that the project of divorce will be pursued unless the ground is genuine and serious. No reformer is anxious to promote needless divorce, for at the best it is a remedy for disease; and here, as elsewhere, prevention is better than cure. Therefore, whereas, under a law which allows divorce to be too easily obtained by some, husbands and wives can now escape from one another by

observing the rules, a reformed law will stiffen the conditions of such suits; and whereas, under a law which makes divorce impossible except through a scandal, husbands and wives are apt to assume a permanence which excuses them from taking sufficient pains to please one another, a reformed law, which will make divorce possible without the deterrent of a scandal, may induce from the outset a desire to find agreement, to maintain affection and to promote peace. If incipient incompatibility were met by serious effort to avert friction, the effect would be to cut at the root of such offences as adultery, desertion, cruelty, and habitual drunkenness, wherever these were, as commonly they are, not original causes but symptoms of matrimonial disease.

The problem which faces reformers is, therefore, that of devising (1) a definition by which the Courts shall be enabled to assess incompatibility, and to be assured that it exists in a measure sufficient to justify a decree of divorce with the same facility as on other substantive grounds, and after the same duration in the matter of decree absolute; and (2) a working system by which a petitioner shall be able to show evidence of incompatibility in spite of a successful defence. There must be evidence that the marriage has broken down, to which end it may be necessary for the petitioner to show that he or she is prepared to wait for a decree through a period of separation and probation. A suggestion has been made that divorce on the ground of incompatibility should be obtainable by application at the office of the local Registrar, and that a divorce should follow, if after a year there has been no return to connubial life and the separation has been complete.<sup>1</sup> But it ought to be urged very strongly that no proceedings in a matter so serious to human destiny should be effected in this automatic manner, nor should they be brought before any tribunal inferior to the High Court, which, of course, includes the Assizes in undefended cases and in cases brought under the Rules for Poor Persons. A process will therefore be proposed.

#### (i) DEFENDED SUITS

The petitioner would file a petition in the usual way under the Matrimonial Causes Rules, 1924, Rule 1 (A) & (B), stating the

<sup>1</sup> Ralph De Pomerai, *Marriage: Past, Present and Future*, p. 270.

ground on which the petition is based, viz., incompatibility. The petition would then be served on the respondent (the terms at present in use being retained for convenience, although their meaning may seem not to be strictly relevant to suits which are undefended, i.e., not antagonistic), and testified by affidavit of service, as provided for in Rule 14 according to the form in Appendix III to the Rules. The respondent's answer, on a form corresponding with that provided for in Rule 14, and given in Appendix VI, would pray either (a) for the rejection of the petitioner's prayer, or (b) for the relief for which the petitioner has prayed.

If, then, after service of the petition, the respondent should pray for the rejection of the petitioner's prayer, the Court will hear the cause and determine on the evidence of alleged incompatibility, whether or not the marriage could rightly be judged to have broken down. Before hearing the suit, the Court will at its discretion order payment by the petitioner of such amount of money as may be necessary in the most extreme circumstances hereinafter to be set out.

It has been urged that the difficulty of definition of incompatibility is due to the fact that only the two persons concerned can rightly judge of its existence and extent. A definition must in some way lay hold of the external manifestations of the state defined; for otherwise the Court would be entirely dependent on the evidence of one or other of the spouses. In the event of the respondent's answer being a denial of the ground alleged by the petitioner, the Court would require evidence. Any answer other than denial would go to confirm the allegation of incompatibility; the allegation of collusion would show the respondent's admission of the desirability of divorce; that of connivance would confirm the petitioner's need of divorce; that of condonation would be evidence that there had been an offence to condone. The discretionary bars would argue to the same conclusion: petitioner's adultery, cruelty, desertion and conduct conducing would all point to the validity of the petition; undue delay would not be relevant, because incompatibility is a continuing state. To all these possible answers of the respondent, the petitioner's further reply would be that they confirmed the incompatibility alleged, apart from the disclosure of other possible grounds for dissolution. Thus denial remains the only answer to the petition,

if the respondent wishes to contend the suit. For the purposes of the Court, in the event of such a suit, the following definition may be suggested, viz., that incompatibility consists in such disagreement between the interests and inclinations of the spouses as excludes a life of common purpose, cohabitation, and further procreation of children, and promotes violence in act and speech when the parties are not separated. The position would be this: that whereas at present one party may refuse to bring a suit and set free the other who has been guilty of adultery—and under the proposed extension of grounds this would apply to desertion, cruelty, habitual drunkenness, insanity and imprisonment—the provisions for divorce on the ground of incompatibility would enable either party to petition for the termination of the marriage. This procedure may invite the criticism that any spouse having an inclination to adventure a new marriage could secure freedom to do so through an isolated fit of violence. To this we answer that the ground is incompatibility of such serious measure that united living has become impossible, even though the original aversion were on one side only, and the Court will judge of the conditions, of which the violence is a symptom. The Court therefore will hear evidence over a sufficient period, to be determined by statute—say two years past—to satisfy itself that the allegation brought by the petitioner is true, and that any overt acts cited by witnesses are true symptoms of the fundamental state alleged.

#### (a) *Successful Suits*

If the alleged incompatibility is proved on the evidence, the Court will grant a decree *nisi* to be followed by a decree absolute in six months, provided that the King's Proctor shows no cause on the ground of the petitioner's abuse of the period between the decrees.

#### (b) *Unsuccessful Suits*

But it may be that the incompatibility is not proved, at least to the extent that the respondent has disproved his or her conscious part in it. The Court will then direct that the petitioner shall show further evidence of the intensity of the aversion which has led to the allegation of incompatibility. To this end the petitioner

must be prepared to wait for the decree through a period of separation and probation, and to pay compensation to the respondent in larger measure than would otherwise be held to be adequate maintenance in the circumstances of the case. The parties will then be required to separate for a year. If at the end of that period the King's Proctor shows no cause against the petitioner on the ground of his or her having abused the period of probation, the Court will grant a final decree. If the petitioner's record is not to the satisfaction of the Court, the Court will have the discretion to extend the period of separation and probation for one year, at the end of which a final decree of dissolution will be pronounced.

*(c) Alimony and Maintenance*

In order, however, to ensure that there shall be adequate consideration of the respondent, especially if the respondent should be successful in disproving his or her part in the alleged incompatibility, the Court will order provisional payments of money by the petitioner: (1) alimony during the hearing of the suit and the period of probation, together with (2) adequate payment in advance in respect of maintenance after decree in view of the possibilities of the petitioner's having to show incompatibility by the severest test. The administration of the money to be paid into Court in cash or securities will be referred to the Conveyancing Counsel of the Court. If the allegation of incompatibility is not admitted by the respondent's answer to the petition, the amount to be paid into Court to provide maintenance will be more generous than if it were foreseen that the incompatibility would be proved. If the incompatibility is proved at the hearing of the suit, and the decree absolute follows after six months from the decree *nisi*, the amount actually to be paid to the respondent will be smaller than the amount which has been provided, and a balance will be returned to the petitioner.

In the case under consideration, wherein the respondent's answer does not admit the incompatibility alleged by the petitioner, the Court will assess the amount to be paid by the petitioner, by consideration not only (a) of the petitioner's failure to prove complete incompatibility when the suit is heard, but also (b) of the possibility of the petitioner's record during the period of probation incurring the disapproval of the Court.

At the end of the period the Court will make a second assessment on the actual, as distinct from the problematical, position and record of the petitioner. If the King's Proctor should show cause on the ground of the impropriety of either party during the period of probation, the impropriety of the petitioner would either prejudice the decree (i.e. cause its postponement for a further year) or increase the maintenance; but the impropriety of the respondent would favour the petitioner. In its essence incompatibility is mutual, and any conduct on the part of the respondent which is inimical to reunion under this procedure would be evidence of the fact. But the petitioner who seriously intends to prove the alleged incompatibility ought to show a good record during the period of probation. Any return to conjugal life may effectively disprove the incompatibility, and any misconduct cited and proved in the King's Proctor's plea may reflect on the *bona fides* of the petitioner.

This procedure presupposes equality of sex and equality of financial resources, for it is certain that a much larger proportion of wives can lay claim to independence than used to be the case. But some adjustment of this procedure will be required when one party, and that the petitioner, is financially dependent on the other. Of course, when a wife petitioner is a woman of financial fortune or independence, she would be required to pay at the Court's discretion under the scheme proposed. If she is possessed of no resources, she will not be in a position to meet the Court's demand in the event of the respondent husband's not admitting the allegation of incompatibility. And if her allegation at the hearing of the suit amounts to her personal aversion but not to mutual incompatibility, and she is therefore required to prove her title to divorce by separation and probation, she will not be able to add compensation as further evidence of the truth and genuineness of her contention. If (1) she is prepared to separate for the requisite period, with no resources other than a small allowance by way of alimony and maintenance drawn from her husband, as under the present law, at the discretion of the Court, and (2) she shows a good record at the end of the period, this will be sufficient to satisfy the Court. Payment by a petitioner who possesses the money will contribute to the evidence of a genuine claim, but it cannot and need not be made an indispensable condition. In the case of Poor Persons' petitions on the

ground of incompatibility, this procedure would apply, together with the rules for Poor Persons *mutatis mutandis* accordingly.

The principle of payment into Court by a petitioner, both (1) in alimony and (2) in incidental proof of *bona fides* in the allegation of incompatibility, would apply after decree absolute only in respect of Maintenance proper. This would be ordered at the Court's discretion as under the existing law (Judicature (Consolidation) Act, 1925, s. 190 (1) & (2)), with the requisite adaptation of incidence, viz., that generally the petitioner would provide for the respondent. The amount would be more generous in the case of an unsuccessful suit than in that of a successful suit in which the incompatibility was proved in the first instance. But the Court would take into account (1) the resources of the respondent, who might not need maintenance, and (2) the case of a wife petitioner without resources (considered *supra*) who could reasonably claim continuing support from her husband *dum sola*. A provision is requisite for the termination of maintenance on the re-marriage of the party who receives it. N.B.—For maintenance of children see under Custody, *infra*.

#### (d) Custody of Children

The Court would make orders for the custody of any children of the marriage at its discretion under the Guardianship of Infants Act, 1925,<sup>1</sup> s. 1. The provisions of this Act suit the case well, because they direct that the consideration of the Court shall be given to the welfare of the children, without regard to any rights at Common Law possessed by the father, or to any claim to superiority as a custodian on the part of either the father or the mother. The previous Guardianship of Infants Act of 1886, which provided negatively (s. 7) against the custody of the children by the guilty party, is seen frequently to have been irrelevant in the light of our consideration of innocent and guilty parties (Book III, Section I, Chapter III), and would clearly have no application to a case of incompatibility. It in no wise follows from a suit in the Court that the innocent party is the better fitted to bring up children; and it may well be that neither parent is as well fitted as an independent guardian, whom the Court is in

<sup>1</sup> 15 & 16 Geo. V, c. 45.

any event free to appoint.<sup>1</sup> It may happen, therefore, that parental divorce will yield an adventitious benefit to the offspring of the marriage.<sup>2</sup> The Court would have discretion to make orders for the maintenance of children before and after decree, in addition either to the money paid into Court by the petitioner or to the alimony and maintenance provided by a husband in the case of a wife petitioner without resources. But regard would always be had to the possible financial fortune or independence of a wife; e.g. if she were respondent in a contested suit on the ground of incompatibility, the Court could transfer to her the responsibility for maintenance of the children.

*(e) Incompatibility Suits on the Grounds of Imprisonment and Insanity*

The circumstances, and the justice of the case, require that suits on the ground of imprisonment, when brought as incompatibility cases, and suits on the ground of insanity, shall be put into the defended list; for then, if the defence were successful in showing that the imprisonment or the insanity had been caused by the petitioner's conduct, the Court could assimilate the penalty for such conduct to that which it would impose in consequence of a successful allegation by the King's Proctor after the first year of separation and probation after other suits, and could in these cases impose the period of two years' probation at the first hearing. The deterrent value of the Court's option to extend the period to a maximum of two years will be considered in sub-section (II) of this chapter. A further provision is requisite in the case of incompatibility suits where the ground is insanity, viz., that, even if the suit is successful on the ground that the petitioner is shown not to have caused the insanity of the other spouse by his conduct, the Court may demand evidence, so far as it is possible medically to furnish it, that the insanity is incurable before relinquishing

<sup>1</sup> *Curtis v. Curtis* (1858), 1 Sw. & Tr. 75. But see *In re J. M. Carroll* (1931) 1 K.B. 317, C.A. (not Divorce). Cf. also Plato, *The Republic*, Book V, where the separation of children from parents is contemplated in a more systematic form.

<sup>2</sup> Cf. Eden Paul, M.D., in *Sexual Reform Congress Proceedings*, 1929, p. 356.

'The people who want to bear children and the people who actually do bear children are not always the people who are the best fitted to rear children.

'Many people who do not want to bear children, or who are ill-fitted to bear children, are eminently suited to rear children.'



the right to extend the period from six months to one year or two years. The recovery of the other spouse before the final decree might have the effect of extinguishing the ground of incompatibility at the petitioner's own volition, and in such a case it would be the duty of the Court to protect both the respondent and the petitioner himself from the consequences of the petitioner's too hasty action.

## (ii) UNDEFENDED SUITS

The provisions for a dissolution of marriage on the ground of incompatibility are necessarily involved, in order to give a petitioner on that ground an ultimate right to divorce, and at the same time to allow to a respondent the possibility of stating such objection as will have the effect of testing fairly the petitioner's *bona fides*. But where the suit is undefended the procedure will be simple. A petition, when the suit is undefended, will not necessitate more than formal proof, although that will involve the test of separation and probation (as in the case of a defended suit in which the petitioner asserts incompatibility which amounts to personal aversion, but cannot successfully prove that the alleged incompatibility is mutual). Thus, when the respondent's answer is a prayer for the relief for which the petitioner prays, the effect will be the equivalent of a petition by mutual consent.

## (iii) MUTUAL CONSENT<sup>1</sup>

In the case of an original petition by mutual consent a new form will be provided, by which the parties can file a joint petition praying that their marriage may be dissolved. From that point a petition for dissolution by mutual consent and an undefended suit on the ground of incompatibility will be subject to the same procedure. The Court would hear the reasons for which the parties alleged that their marriage had broken down, and would order the parties to separate for a year; the papers would be sent

<sup>1</sup> Although the proposals and safeguards in Chapters II and IV of this Section were devised independently and without reference to the Evidence of the late Sir John Macdonell on Mutual Consent before the Royal Commission, it is a source of satisfaction to realize that there are a few points at which these proposals were anticipated by so great an authority (*vide* Royal Commission, Minutes of Evidence, Vol. I, Q. 393 and 408).

to the King's Proctor, who would take such steps as might be necessary to ensure that the parties did not meet except by permission of the Court, and otherwise did not abuse the period of probation by anticipating any intended matrimonial union on either part. The object in the Court's hearing the parties' reasons for desiring divorce is not directly to prevent the divorce, because the procedure will not give to the Court a complete discretion to refuse a decree, but to enable the Court to advise the parties with a view to reconciliation. At the end of the period of one year, the parties would come again before the Court, and if there were any doubt of their determination, or any adverse evidence on the part of the King's Proctor, the Court would have a discretion to extend the period of probation for one more year; but if the incompatibility were evidently genuine, and the determination to part were undoubted, the Court would grant a final decree.

The same procedure as before would apply to the custody of children, and to the provision of alimony and necessary maintenance, but not to special payment as by the petitioner in a defended suit. The Court, however, would have regard to any proposals for custody and maintenance which might be made by the mutually consenting parties; e.g., one of the parties might make a generous settlement on the other *dum sola*, but wish to set a limit to it in the event of the other's marriage. The Court would then exercise a discretion in the matter of its reduction or termination on re-marriage. A joint petition would be heard in the usual way by the High Court in London, but would be eligible as an undefended suit at Assizes; and the Poor Persons' Rules would apply where applicable.

N.B.—the symmetry of this scheme seems to require the division of suits on the ground of incompatibility into defended and undefended suits, because incompatibility is a contestable ground. To avoid needless repetition of procedure, however, it is seen that a practical classification puts an undefended suit on this ground on the same footing and in the same class, in every respect except its initiation, as a petition for dissolution on the ground of mutual consent. A still simpler process could, of course, limit suits on the ground of incompatibility to defended suits, and leave all otherwise undefended suits to be provided for as Mutual Consent cases. This would be provided by the elimination of subsection (ii) *supra* and the references in the text to undefended suits.

## (iv) MISCELLANEOUS PROVISIONS

(a) *Variation of Settlements*

The discussion of this difficult question in Book I, Chapter VI, has shown the measure of the Court's consideration within the Statute, the principle being that after divorce the parties shall remain financially as far as possible as they would have been in the absence of a decree. The same principle will rightly apply under our new proposals in the case of ante- and post-nuptial settlements; but provisions are requisite for the variation of settlements on re-marriage in such wise that, subject to due provision under a Trust for the children, if any, of the dissolved marriage, the settlement may be varied on the re-marriage of either party, in order to apportion to the two parties their own respective contributions to the original settlement, and to carry out as far as possible in the new conditions the intentions of any other settlor, or settlors, towards the *cestuis que trust*. Where a settlement has been made by the parties themselves solely out of their own funds, the settlement (subject to provision for the children, if any, as *supra*) could on the re-marriage of *both* parties be treated as after decree of nullity. It would then be dissolved, and the money conveyed to the settlor, or settlors, as in the case of *A. (otherwise M.) v. M.* (1884), 10 P.D. 178; see also *Attwood (otherwise Pomeroy) v. Attwood*, [1903] P. 7.

(b) *Maintenance After Decree*

This has been treated above in respect of the proposals for dissolution on the new grounds of incompatibility and mutual consent. But, as a remedy for the defect noted in Book I, Chapter VI (under 'Alimony and Maintenance'), and Book III, Section I, Chapter III, it may here be urged that the *dum sola* clause should be made to apply to maintenance after divorce in the case of antagonistic suits on the present, or any additional grounds.

(c) *Costs*

The present rules for the payment of Costs will continue to apply, except (a) in the case of undefended suits on the ground

of incompatibility (if this procedure be adopted), and (b) in the case of petitions by mutual consent. Both of these being virtually joint petitions, the Costs will be paid by mutual arrangement between the parties. Under (a) they will be chargeable to the petitioner, and under (b) to the husband.

#### (d) *Damages*

Damages will be inapplicable in the case of suits on the new grounds. The present statutory provision for damages will, however, continue as at present in the case of suits on the ground of adultery, where a co-respondent is cited.

### (II) OBJECTIONS CONSIDERED

The standing and reiterated objection to divorce by mutual consent is in great measure the product of prejudice, and that prejudice is very strong, although its validity is very doubtful. There is a clear argument that if consent makes a marriage, consent ought rightly to unmake it; or if a marriage is made by love, a loveless marriage has ceased to be more than an empty form. The proposed reforms, which would establish divorce on the grounds of incompatibility and mutual consent, would doubtless widen the road to re-marriage; but they would not necessarily lead to a lax view of marriage. There would be every likelihood of the prevention of a large volume of adventitious adultery, because unhappily married persons would be enabled to bring their case into Court in its true colour, and would no longer be required to present themselves as accuser and accused of an offence which neither of them desired to commit. If it be thought that the removal of the stigma, which attaches at present to divorce on the ground of adultery, would encourage some persons to resort to the Court too readily to secure the new relief, it may be suggested that the new procedure is compassed with conditions and safeguards which are sufficient to prevent its ever being treated as an empty form. Indeed, the combination of difficulty with the fact that a petitioner who observes the conditions cannot ultimately be barred, might well prompt each party to take trouble to make the marriage happy and to avert the allegation of incompatibility.

In diametrical opposition to this last argument, however, one serious objection lies against divorce by mutual consent,<sup>1</sup> viz., the possibility that pressure might be brought by the threat or force of one spouse to induce the other unwillingly to agree to join in a petition. This objection was brought by the late Lord Gorell in his own evidence at the Royal Commission.<sup>2</sup> It carries great weight, and deserves the attention of Law Reformers. It would certainly weigh with the Legislature in the event of so large a measure of reform finding incorporation in a Parliamentary Bill. Yet this objection was not new when it was raised twenty years ago, nor is it by any means final. Jeremy Bentham recognized the objection considerably more than a hundred years ago, and faced it in the section of *The Theory of Legislation* which deals with the Principles of the Civil Code.<sup>3</sup> Bentham, of course, was writing when the Canon Law was still administered in the Ecclesiastical Courts, and marriage was indissoluble except for those privileged persons who could avail themselves of the expensive procedure of a Private Bill in the House of Lords. Although he mentions consent, he is not writing specifically of divorce by mutual consent, but of dissolubility in general; but he clearly assumes that the establishment of dissolubility would mean consent, and in so far as the objection which he posits to divorce in general does not take account of mutual consent, it would apply *a fortiori* to that project. Of the other objections to divorce which he raises he does not admit the validity, but this he regards as serious. The objection and the answer, as he gives them, run as follows:

*'Third Objection:* The dissolubility of marriage would produce in the stronger party a disposition to maltreat the feebler, in order to force consent to a divorce.

*'Answer:* This objection is solid; it merits attention on the part of the legislator. Fortunately, a single precaution will be sufficient to diminish the danger. In the case of bad treatment, the party ill-treated should alone be set at liberty. Thenceforth, the more desirous a husband might be of a divorce, for the sake of a subsequent marriage, the more fearful he would be of ill-conduct towards his wife, lest such actions might be construed as violence intended to force her consent. Gross and brutal means being

<sup>1</sup> Including incompatibility when the suit is undefended.

<sup>2</sup> *Minutes of Evidence*, Vol. III, p. 546, Sect. 139.

<sup>3</sup> Edition translated from the French of Etienne Dumont, 1864, p. 227.

prohibited, attractive means would be his only resource for persuading her to a separation. He would tempt her, if he had the means, by the offer of an independent provision; or he would find another husband for her as the price of his ransom.'

It is clear that Bentham's conception of the dissolubility of marriage was that a reformed law would include mutual consent as a ground. He could not be expected to foresee, what none could then foretell, that when the English Legislature at length reformed the law it would provide but one ground of dissolution, and otherwise establish by statute the law previously administered in the Ecclesiastical Courts. In these conditions, wherein only one party can obtain a divorce, and that on the ground of the other's guilt, Bentham's 'attractive means' which a husband could adopt for the persuasion of his wife, in place of the resort to violent measures, would be barred on the grounds of connivance or collusion, just as much as the more reprehensible methods would invite, if not the absolute bar of connivance, at any rate the discretionary bars of cruelty or conduct conducing. But even if we omit Bentham's speculation as irrelevant to the conditions of the present law, we must admit its force when applied to our own proposals for divorce by mutual consent.

The Reformed Law, which had emanated from Geneva and received scientific elaboration at the hands of the Jurists of Leyden, did as a fact provide for the imposition of penalties on the guilty party. It did not prohibit re-marriage of the guilty party, but rendered it difficult. Again, the inherited principles of the Canon Law, where applicable, continued to bar the suit of a guilty petitioner. These conditions are in no sense comparable to the proposal of Bentham, because Bentham's proposal envisages that consent which the reformed law disallowed. But it is to be noted that the punishment of the guilty party under the Reformed practice fell into desuetude. Practice showed that guilt was rarely the monopoly of one party, and, although the legislators of 1857 assumed an innocent and a guilty party as the condition of divorce—and modified these conditions only by the Discretion, the exercise of which (as we have seen) the Court at once assimilated to the prohibitive effect of the Absolute Bars—it is now realized that innocence and guilt on the evidence are not necessarily the true indications of innocence and guilt in fact. How then does this apply to Bentham's proposal to bar a party guilty of violence

from re-marriage? Bentham's mention of consent rules out from consideration those suits which may still be brought on antagonistic grounds. It would touch only undefended suits on the ground of incompatibility, and joint petitions on the ground of mutual consent. (The case of a defended suit on the ground of incompatibility will require separate treatment *infra*.) It must be presumed that one party had forced the other either to answer the petition by concurrence, or to agree to present a joint petition. Discovery of this coercion would depend on the testimony of the party who had been coerced, for which testimony provision would be made in the procedure. This would be effected by the oath (1) of the respondent that his or her concurrent answer was genuine, or (2) of each joint petitioner that the petition was genuine and mutual. If one party had been coerced, it would be perjury to take the oath, and a possible and obvious duty to refuse to take it. The Court's consequent enquiry would be directed to determination of whether the petitioner on the ground of incompatibility, or the originator of the joint petition on the ground of mutual consent, was or was not guilty of persuasion by threat or violence. If proof of this guilt were conclusive, then, according to Bentham's proposal, the guilty petitioner, or originator, would be barred from re-marriage, but the respondent, or joint petitioner, would be free to re-marry.

In any event, under the scheme proposed in this chapter, re-marriage could not take place for at least one year, and the question of the desirability of this permanent punishment raises the principle implicit in divorce proper, viz., that the right of re-marriage is of its essence. Bentham's proposal would no doubt exercise the desired effect of inducing the party desiring divorce and re-marriage to secure the consent of the other party by gentle persuasion rather than by violence. But the question still remains whether this 'Damocles' Sword' of denial of re-marriage need really be held over the head of the petitioner while he debates the method of obtaining the consent of his spouse to a joint petition or an undefended suit. In any event, the possibility of a *defended* suit on the ground of incompatibility would guarantee the petitioner's divorce and freedom to re-marry on the terms already set out. If the allegation of incompatibility is proved, a decree *nisi* will be pronounced, and, subject to the King's Proctor's not showing cause against the petitioner, a decree absolute will

follow after six months or less at the Court's discretion.<sup>1</sup> And if the allegation is not completely proved, the petitioner can still obtain freedom after one year's probation or at the most two. Why, then, should the petitioner run the risk of forfeiting the right to re-marriage by using needless violence? Bentham's provision would be useful, desirable and even necessary, if the Legislature introduced divorce by consent only on the condition that the consent is mutual. But, granted the further provision of divorce on the ground of incompatibility, which may mean that the consent of the respondent is withheld, while the petitioner proves the genuineness of his case by probation and payment, the inducement to violence on the part of the petitioner is given a peaceful outlet. This is not to exclude as wholly undesirable Bentham's provision for the regimenting of threatening or violent petitioners; for, in contrast with the possible effect of the discretionary bar on the ground of the petitioner's cruelty in preventing the divorce altogether, the provision for the freedom of the party coerced into consent, and for the denial of re-marriage only to the coercing party, is an improvement. But this would apply only to divorce by consent, and, in view of our provision for incompatibility, it would but rarely be necessary.

<sup>1</sup> With exceptional conditions in the case of imprisonment and insanity.



## CHAPTER III

### LIMITATION OF THE BARS TO RELIEF

It is a principle among Divorce Law reformers that the relief of dissolution should be given on such grounds as frustrate the fundamental purposes of marriage. Therefore the penal character of the Absolute and Discretionary Bars invites drastic measures of excision, because the effect of these bars is to prevent a decree, either absolutely or at the discretion of the Court, where otherwise the case for the petitioner has been proved. The principle of this reform is in harmonious accord with our thesis that the surviving influence of the Canon Law principles on present practice is excessive. The question therefore arises how far the operation of these bars is salutary and desirable. The main principle of reform is that relief should be granted for the real causes of matrimonial breakdown, and that evidence should be available to satisfy the Court that the marriage has in fact broken down. If a marriage has reached such a state of collapse that the Court is satisfied on the evidence, the bars which would furnish good defences would seem to have become irrelevant; for matrimonial breakdown means that the parties have passed the limits of united harmonious life, and probably both desire to part. In such an event either the ground of incompatibility or that of mutual consent will serve their need; and, as we have seen, the Absolute and Discretionary Bars would become irrelevant, although the vigilance of the King's Proctor will rightly be needed to ensure the due observance of the conditions of separation and probation. It may, however, be the case that (1) the desire for divorce is not mutual, and (2) the intending petitioner is not agreeable to enduring the longer process of divorce on the ground of incompatibility in the event of the suit on that ground being unsuccessful. Then the petitioner may choose to file a petition on one of the grounds previously considered. There may be sufficient evidence of the adultery, cruelty, desertion, or habitual drunkenness of the respondent. Yet it may be that the offence has been promoted by the petitioner, in which case one or another of the Absolute or Discretionary Bars may rightly be raised. The principle then seems to be just (a) that a petition brought in the

old antagonistic fashion on the ground of the respondent's adultery (or cruelty or desertion) will not obtain a decree if (i) the petitioner and respondent have been in collusion, or (ii) the petitioner has promoted the offence or has condoned it; and (b) that relief to such a petition will be liable to be barred if the petitioner has been guilty of the same offence as the respondent or such offence as now justifies the Court in exercising its discretion to refuse a decree. In the case of a petition where the respondent is imprisoned under a commuted death sentence, or has been certified and confined as a lunatic for five years, it would be a defence if the conduct of the petitioner were proved to have promoted the offence, or to have caused the affliction; but, if the suit were brought on the ground of incompatibility, a successful defence on those grounds would not bar relief, but would extend the period of probation before final decree. Those who choose to appear as antagonists before the Court, except in a suit on the ground of incompatibility, may properly be expected to use the available methods of offence and defence. We have noted the argument against the present English Law that the surest way to prevent a divorce is for both parties to commit adultery; and we agree that if the offences are the true indication of matrimonial breakdown, the case for dissolution rightly gains in weight by the evidence of offence on both sides. But this does not mean that a petitioner can fairly feel affronted by the offence of the respondent, if he or she has committed a similar offence, or any offence which could on any showing be weighed in the scales. At present the law requires that the petitioner shall at least appear to be affronted by the respondent's offence; and if the suit is undefended, it may yet be put into the defended list in order that the allegation, or confession by the petitioner, of guilt which may be a bar may be argued fully. But the reformed law will provide other procedure to meet cases where the antagonism would be, as frequently in present conditions, only assumed in order to satisfy the present law.

In the new conditions, then, the discretionary bars will commonly remain dormant and inapplicable; but they will rightly be raised, if the grounds are adequate, when a petitioner brings an actually antagonistic suit, not on the ground of incompatibility; for if it were not antagonistic in the present sense, and were not a defended suit on the ground of incompatibility

(which is the special provision for ultimate relief by *repudium*), it would be brought either as an undefended suit on the ground of incompatibility or as a petition on the ground of mutual consent. In the case, then, of suits of the old antagonistic form, brought in the new conditions, it would seem to be a fair principle that (1) petitioner's adultery would point to incompatibility as the ground on which the petition ought to have been based, otherwise the petitioner's grievance may be found to be balanced by the petitioner's offence; (2) delay would suggest that the petitioner's grievance was not so serious, and as at present in such a case the law will give relief *vigilantibus non dormientibus*; (3) the cruelty of the petitioner, or the wilful desertion of the respondent by the petitioner, would deprive the petitioner of much of the ground of his or her grievance; (4) the wilful neglect or misconduct of the petitioner might go far to explain the offence of the respondent. Where these conditions applied to an antagonistic petitioner, the ostensibly 'straightforward' suit would rightly be amenable to present procedure.

The restoration of '*repudium*' and 'consent,' together with the generally proposed new grounds, argues in favour of a strict surveillance of antagonistic suits. But this measure would not be directed to securing a complete bar to all relief in such suits, and a reform of the exercise of the discretion, or an orientation of the aspect from which the discretion is viewed, will be desirable then as it is now. It has been observed that of late years (excepting the case of *Apted v. Apted* (1930) (*supra*)) the Court's discretion has been employed more generously in such cases, both in the interests of the family and in order to enable the guilty petitioner to marry, if such were his intention, the woman with whom he had committed the offence; and to that extent the law may be said to have been reforming itself in practice. But it is important now, and, if the relevant statute remains in its present form in the reformed conditions which we desiderate, it will be important then that the discretion be understood to be a discretion to refuse relief, not a discretion to give it; in other words, as we have argued through many pages,<sup>1</sup> that the presumption is in favour of relief, not against it.

But beyond the provision for antagonistic suits and the careful exercise of the discretion, the new facilities would commonly

<sup>1</sup> Book III, Section I, Chapter IV.

dispense with the old procedure; for the parties could obtain the requisite relief, without the scandal of a defended suit or even an undefended suit on the ground of adultery or other extended grounds, provided that they were prepared (i) to submit to the statutory period of separation and probation, (ii) to satisfy the King's Proctor in order to limit that period to one year and so to escape the maximum of two, and (iii) to explain to the Court the genuine reasons for their continuing determination to part.

## CHAPTER IV

### THE PROTECTION OF MARRIAGE

In order to ensure further that the relief shall not be dispensed beyond the genuine need, certain conditions and safeguards are clearly required. One of these has already been provided in the period of probation which in the case of Incompatibility and Mutual Consent is to be one year, with a discretion to the Court to extend the period to two years. Only when the petition on the ground of incompatibility issues in a successful suit will the usual six months from decree *nisi* to absolute apply. In the other examples a decree on the ground of incompatibility or mutual consent will require a longer delay after the first appearance in Court.

#### (i) PRE-MARITAL CONSULTATION AND INSPECTION

The first additional safeguard is an important factor in all proposals for marriage law reform. Greater facilities for relief need balance by some restriction of the present extreme facilities for marriage. The pre-marital consultation and inspection, suggested already in the chapter which treats of additional grounds for annulment,<sup>1</sup> would place a responsibility upon every prospective party who learned by these means of the defects of the intended spouse. A medical inspection, and the production of a certificate of reasonable health, are as important to the private interests of the parties as to the public interest in the future of the race. The marriage of defective species might well be made conditional on sterilization. If the defect is in the form of a disease, such as to frustrate the purposes of marriage, but undiscovered by pre-marital inspection, we propose this as an additional ground for annulment within six months of marriage. If the defect is sexual incapacity, there is no necessity for sterilization, but the parties then marry at their own risk, and in the absence of overwhelming personal considerations it is probable that the discovery of impotence will terminate any matrimonial intentions.

<sup>1</sup> Book III, Section I, Chapter VIII (ii).

## (ii) LONGER OFFICIAL NOTICE OF INTENTION

If all is well with the physical qualifications of the persons who propose marriage, some assurance is also needed of their mental and spiritual compatibility. Only the parties themselves can finally testify to this. But there are possibilities of throwing upon those who are tempted to rush hastily into marriage a larger responsibility than they always realize at present. The law now requires the publication of banns of marriage in church for three Sundays before marriage, or residence for only fifteen days for an ordinary licence, or twenty-one days' notice for celebration of a marriage before a Superintendent Registrar. The present law dates from Lord Hardwicke's Act,<sup>1</sup> as repealed, superseded and amended by later Marriage Acts.<sup>2</sup> If this period were to be extended to six months' notice of intention to apply for publication of banns or for an ordinary licence, or for a Registrar's certificate or licence, this precaution would ensure at least that period of mutual consideration by the parties. In the case of the notice of intention to apply for publication of banns, the notice would be recorded in the banns book of the parish church as authority for the publication of banns not less than six months after that date. If centralization be deemed desirable, the notice of intention could be given to the appropriate Superintendent Registrar, just as it would be given to him for purposes of marriage in his office after the same period; and he could communicate it to the incumbents of the parishes concerned as authority for the publication of banns six months later.<sup>3 4</sup> The only more speedy

<sup>1</sup> 1753 (26 Geo. II, c. 33).

<sup>2</sup> 1823 (4 Geo. IV, c. 76); 1836 (6 & 7 Will. IV, c. 85), s. 42.

<sup>3</sup> Under the Marriage Measure (20 Geo. V, No. 3) notice would require to be sent to all the appropriate incumbents.

<sup>4</sup> This extension might seem to raise the issue of legitimacy. Although in this book we are not strictly required to take the question of legitimacy into our purview, or to urge reforms further than those effected by the Legitimacy Act, 1926 (16 & 17 Geo. V, c. 60), we should note that the period of six months' notice of intention to marry need not bar a child conceived before marriage from being born in wedlock. In the event of those, who in present conditions would marry between the conception and birth of a child, finding that they have postponed their notice of intention too late to enable the child to be born in wedlock, the Legitimacy Act provides for the legitimation of such a child *per subsequens matrimonium*. Judicial decisions seem to show that, in spite of the plain provisions of the Act in Sect. I, sub-sect. (1), an actual declaration of legitimacy is desirable if not necessary. It is to be noted that the Act specifically

method would be the Archbishop of Canterbury's licence—or that of the President of the Divorce Division, if that extension be adopted<sup>1</sup>—which is occasionally obtained, but at considerable cost. If the objection should be raised that under this rule rich people alone would have the privilege of rapid marriage, it may be answered that that applies to some extent to-day, but further that, under the present proposals, this advantage would be offset by the impediment of an adequately restraining moral influence, which, while applicable to all, would especially affect the circumstances of richer people. To this proposal we now proceed.

### (iii) NO PETITION WITHIN THREE YEARS OF MARRIAGE

In no circumstances should any person petition for dissolution within three years of marriage. That is to say, that no petition for divorce on the new grounds of incompatibility and mutual consent could take effect in a decree of dissolution within at least four years of marriage, except in the case of a successful suit on the ground of incompatibility, when the minimum period would be something over three and a half years. In the case of other suits the minimum period would likewise be three years plus the period from petition to decree absolute. This 'close period' would go some way to ensuring that the newly married should make some serious attempt at mutually happy and successful marriage, and would act as an admonition in advance that there would be no early escape from an ill-considered adventure. There would be no more hasty marriages followed by decree *nisi* in a few months; and perhaps the knowledge that divorce would be impossible for a period of years after marriage would inculcate a necessary measure of responsibility and reflection.

### (iv) STRICTER SCRUTINY OF COLLUSIVE SUITS

In addition to these restrictions on marriage, the new facilities for dissolution ought to be balanced by a considerable curtailment of the advantages which are now taken of the present procedure

excludes from legitimacy a person who was born when either the father or the mother was married to a third person, and thus the bar sinister remains in the case of persons born in adultery.

<sup>1</sup> Book III, Section I, Chapter V.

on the ground of adultery. The collusive adultery, which the President has of late years sought to suppress, would no longer be needed by parties who sought their freedom, unless for some reason they were not prepared to endure the period of separation and probation prescribed (*supra*) in the case of undefended suits on the ground of incompatibility and petitions by mutual consent. A suit on the ground of adultery would be definitely antagonistic and would be put in the defended list; and the Court, administering a reformed law, would exercise a much closer scrutiny for the exclusion of all those collusive suits which are known as 'hotel cases.' Reform is intended to make divorce not more easy in every way, but more just for everybody; to extend the grounds, but to protect them from abuse.

#### (v) PROVISIONS FOR RE-MARRIAGE

The statutory right of *divorcés* to re-marry after the decree absolute has been pronounced by the Court, under the Judicature (Consolidation) Act, 1925, s. 184, will, of course, remain under the new law; but the right of re-marriage in churches and chapels of the Established Church requires consideration and provision. In the light of our study of this question,<sup>1</sup> we should recommend that the right be retained with one amendment. Since, under present law, the distinction between innocent and guilty parties is in a large measure formal and fictitious, and since under the new provisions for dissolution on the grounds of incompatibility and mutual consent the distinction largely disappears, therefore the amendment of the present law would take the effect of removing this distinction from the statute. The retention of the rights of the citizen, and the protection of the ecclesiastical conscience, are not easy to reconcile in one statute; but perhaps a small amendment will secure a just balance, viz., that the citizen retain the right to the use of the Parish Church, but that the clergy be invested in all cases alike with the discretion to refuse, which the statute now gives to them in the case of the 'guilty' party. The only amendment to the present statute which is required by this provision will be the omission, in the Judicature (Consolidation) Act, 1925, s. 184 (2), of the words, 'on the ground of his or her adultery.' Section 184 (3) will stand as at present.

<sup>1</sup> Book III, Section I, Chapter V.



## (vi) LIMITATIONS ON RE-MARRIAGE

The last safeguard to be proposed is one which would answer a common objection against facilities for matrimonial change, and prevent such a case as that recorded by St. Jerome and quoted by Lecky.<sup>1</sup> A limit would be set to the number of re-marriages, and the number might well be indicated by the example quoted in our chapter 'Indissolubility and the Challenge of Life,'<sup>2</sup> viz., that the third marriage should be the final matrimonial venture of any one person, unless one or more of those marriages had been terminated by death, when they would not rank among the three.

<sup>1</sup> *Vide* Book III, Section II, Chapter II.

<sup>2</sup> Book III, Section I, Chapter I.

## SECTION III

### SEPARATION

#### (i) THE ABOLITION OF PERMANENT SEPARATIONS

To these provisions for the extension of the grounds for divorce must be added some considered scheme by which separations of various kinds shall be amenable to the new principles. The first recommendation is that of the *Reformatio Legum*<sup>1</sup> in the 16th century, endorsed by Lord Gorell in *Dodd v. Dodd*,<sup>2</sup> that permanent separations be abolished on the practical grounds that they impose undesirable conditions of celibacy upon persons who are accustomed to cohabitation, and lead to a large amount of sexual irregularity. Under the recommendations of the Majority Report desertion for three years would be ground for a petition for dissolution of the marriage. The same period would suitably be adopted as the limit of a separation, after which period the petitioner will know that the alternatives are either a return to cohabitation or a decree of dissolution. This will require different procedure to match the varieties of separation which are now possible.

It will not be necessary to review once more the Separations which have already received large attention;<sup>3</sup> but it will need some notice of the incidence of the newly proposed provision for divorce on the ground of incompatibility. This ground will plainly facilitate petitions, and consequent decrees, for those who would now be the victims of judicial separation.

#### (ii) PROCEDURE IN THE CASE OF

##### (a) *Judicial Separation*

In any event it is proposed that under a Reformed Law where one party petitions successfully for a decree of judicial separation, the separation would cease to be effective after three years. The decree would be a decree of three years' separation, at the end of

<sup>1</sup> Book I, Chapter VI.

<sup>2</sup> [1906] P. 189.

<sup>3</sup> Book II, Section I (iii); Section II, Chapter III (vi); Section II, Chapter IV; Book III, Section I, Chapter VI.

which, if the petitioner did not desire a return to cohabitation, the Court would pronounce a decree of dissolution. The interesting question arises how the respondent would regard the prospect if the petitioner elected to return to cohabitation. If the respondent were an unwilling party to the suit and regretted the separation, it is possible that the petitioner's wish to return would be acceptable to the respondent. If, however, the respondent resented the suit for separation, but would have welcomed a suit for dissolution, then the course for the respondent to adopt would be at once to cross-petition on the ground of incompatibility. If a respondent entered no such cross-petition, the presumption would be that he regretted the separation and would welcome a return to cohabitation. If the petitioner were in no mind ever to return, then it is probable that under the new facilities available to the respondent the original petition would be amended to one for dissolution. It is, however, possible that the petitioner would prefer to petition for a separation in any event, and the respondent, at first anxious to return to cohabitation, would change his mind during the period of separation. In that case he must inform the Court; and the petitioner will then be instructed that the separation will become a dissolution at the end of the period. Since, unless both parties wish for a return to cohabitation, a dissolution is beneficial to both, the order for alimony and maintenance will be made in such wise that the petitioner shall gain as the result of a successful suit, but that the respondent shall lose less by giving notice during the separation. The order will provide for alimony during the separation, and for a sufficient sum to be settled upon the petitioner in the event of a dissolution where the respondent has given no notice during the separation. If, however, the respondent gives due notice and does not disappear, the amount will be reduced, and the balance returned to the respondent. This provision will ensure that if the respondent disappears and gives no notice, so that the petitioner must receive the decree of dissolution at short notice, the respondent shall pay adequately for his freedom. The Court would have discretion to order the maintenance of the petitioner *dum sola*, and if the petitioner re-married, the respondent might recover his money, if he could be found. This procedure is admittedly more complicated than an absolutely automatic decree of dissolution at the end of every separation of three years' duration; but it provides for the

possibility that, after the first exasperation, neither may wish actually for permanent separation or for re-marriage to other partners; and therefore, by giving them the opportunity of coming to the Court with a definite decision by a fixed date, it guards against the possibility or the likelihood of the decree of dissolution at the end of three years being given without their knowledge or understanding. The present statute providing for judicial separation (Judicature (Consolidation) Act, 1925, s. 185 (2)), would therefore require revision in this sense, viz., that on the statutory grounds for a judicial separation, if proved to the satisfaction of the Court, the decree of judicial separation would remain in force for three years, at the end of which period the petitioner shall either return to cohabitation with the respondent, or shall receive a decree of dissolution, the rules for notice, alimony, and compensation being incorporated in the new provision.

#### *(b) Separation Orders and Deeds of Separation*

In the case of separation orders granted by Courts of Summary Jurisdiction on the existing grounds, the right of granting a separation for more than two years would be removed, and no order providing that the applicant should not be bound to cohabit should be given except on the ground of cruelty and habitual drunkenness (for if it were given, as has commonly been the case, on the ground of desertion, it would terminate the desertion and deprive the applicant of that ground of dissolution in the High Court). On the expiration of two years, all orders for which renewal is asked would be referred to the High Court (including Assizes for undefended actions and Poor Persons' Cases), where the application would be heard; and, if approved, the separation would be extended for one year, after which the applicant would have the choice between a return to cohabitation and a petition for dissolution. In any event, the separation order would cease to run after the total period of three years. This provision would serve for the temporary protection of the applicant, it would curtail the period during which there might be grave risk of misconduct, and it would force the parties to the definite step of reunion or dissolution.

In the matter of deeds, or agreements for separation, it is to

be remarked that the law takes no account of such deeds or agreements unless they are brought into Court as the ground of an action for maintenance. It is suggested that all such deeds should be recorded in a Court of record, and that, as an alternative to a civil action for recovery, an application should be permissible in a Court of Summary Jurisdiction for payments of under £2 weekly or to the High Court for payments of over £2 weekly (as recommended by the Majority Report) where the Court shall have the powers recommended, viz.,

- (1) to treat the agreement as at an end;
- (2) to find the husband guilty of desertion from the date of the first default, whereupon the husband shall be deemed to be guilty of desertion for the purpose of any proceedings in the High Court;
- (3) to make an order for maintenance on the ground of desertion unless the Court should think that reasonable excuse for default had been shown;

and, in addition, the separation should be terminated at the end of three years either by return to cohabitation or by dissolution.

## CONCLUSION

The argument for the reform of the Law in Matrimonial Causes implies, of course, a definite rejection of the ecclesiastical view, as that view has been inherited from the long reign of the Papal Canon Law. It attributes the failure and unreality of the present Law of England to the undue influence of the Canon Law in principle and practice; and incidentally—for this does not directly affect the legal study of the question, although it is important wherever public opinion is brought to bear on Matrimonial Causes—it carries the contention that the ecclesiastical view, as expressed in the indissolubility of marriage, is not the best expression of the Christian religion. Permanent union is the ideal of every marriage and the intention of all who marry in mutual affection. But when love passes from marriage or turns to deadly hatred, the marriage has dissolved itself in all but external form. Experience shows that the rule of indissolubility promotes illicit unions; but a well-regulated system of divorce will strengthen the stability of marriage.

In proposing mutual consent (incompatibility mutually admitted) and incompatibility (as a contestable issue) as grounds for divorce we have advanced beyond both the recommendations of the Majority Report of 1912 and the Matrimonial Causes Bill which Lord Buckmaster introduced in the House of Lords in 1920. This step involves both an extension and a change of principle. First, an extension; for while the principle of the dissolubility of marriage is now established in the Law of England, the radical argument is that divorce should be obtainable as far as possible on the real ground of matrimonial failure, and not as the result of forcing the failure to fit the definition of one existing ground—a process which at present can be effected sometimes too easily when it is ill deserved, sometimes not at all when it is needed. This root argument was enunciated by the late Lord Gorell, when he said that the law should be such as would give relief where 'serious causes intervene, which are generally and properly recognized as leading to the break-up of married life.' Secondly, our proposals involve a change of principle in the provision of an alternative to the antagonistic suit. It must be admitted that the causes which frustrate the objects of marriage

do not necessarily lie in overt acts, although they may sometimes be thus expressed. For this reason, among others, it was the wisdom of the Civil Law of ancient Rome to allow divorce both by the *repudium* and by mutual consent. The weakness of that law lay in the absence of protection against the abuse of needless, frequent and frivolous change; but if the reforming zeal of the Christian Fathers and the early Christian Emperors had been addressed to the prevention of abuse rather than the abolition of the grounds which had been abused, the effect would have been not to undo the work of the wisest lawyers of antiquity, but to qualify their system by the true spirit of the Christian religion. To promote the restoration of these grounds for divorce, in addition to the introduction of certain other grounds which have long been advocated, together with new safeguards both for the protection of marriage and against too easy dissolution on any ground, is the constructive conclusion of our study in the law of divorce.

That these proposals will carry conviction and command the concurrence of reasonable opinion is much to be hoped. Some reformers may resent the restraints, and regard with impatience the cautiously qualified legal processes which we have proposed. But while the law continues to be administered by the Courts, and does not pass into the go-as-you-please licence of free love, the work of reform must be the combination of the largest liberty with the most careful protection from abuse. Another source of opposition may, of course, be expected. The ecclesiastical view at present admits no compromise with any extension of the grounds for divorce. It is hardly tolerant of the existing ground, which derives such respect as it receives from the problematical authority of two doubtful dominical pronouncements in one Gospel. The ecclesiastical mind (which is not everywhere synonymous with the Christian mind) would doubtless wish to prohibit divorce (in the sense of dissolution) altogether, and recover the one-time ecclesiastical control, which limited 'divorce' to permanent separation and misapplied the term to annulment. Yet by a strange perversity this influence, powerful in the past and surviving in the present, is the explanation of much of the chicanery, scandals and abuses which now cry for reform.

Although some improvements and ameliorations have been registered in the English Law in Matrimonial Causes since the tentative legislation of 1857, much remains to be accomplished

and the greater reforms are over-due. When Parliament has time, inclination and adequate support in public opinion, it will hear the cry of a great company of citizens who need relief and cannot obtain it, or who obtain it on a fictitious ground which in their own better judgement they resent, or yet again who take it in lawless defiance of Church and State alike. Then we may hope that the reactionary ecclesiastical opposition will not again defeat the ends of justice.





## APPENDIX I

### TEXT OF THE JUDICATURE (CONSOLIDATION) ACT, 1925 (15 & 16 GEO. V, C. 49), SS. 176 TO 187.

#### PART VIII

##### MATRIMONIAL CAUSES AND MATTERS

###### *Divorce and Nullity of Marriage*

176. A petition for divorce may be presented to the High Court (in this Part of this Act referred to as 'the court')—

- (a) by a husband on the ground that his wife has since the celebration of the marriage been guilty of adultery; and
- (b) by a wife on the ground that her husband has since the celebration of the marriage been guilty of rape, or of sodomy or bestiality, or that he has since the celebration of the marriage and since the seventeenth day of July, nineteen hundred and twenty-three, been guilty of adultery:

Provided that nothing in this Act shall affect the right of a wife to present a petition for divorce on any ground on which she might, if the Matrimonial Causes Act, 1923, had not passed, have presented such a petition, and on any petition presented by a wife for divorce on the ground of the adultery and cruelty, or adultery and desertion, of her husband, the husband and wife shall be competent and compellable to give evidence with respect to the cruelty or desertion.

177. (1) On a petition for divorce presented by the husband or in the answer of a husband praying for divorce the petitioner or respondent, as the case may be, shall make the alleged adulterer a co-respondent unless he is excused by the court on special grounds from so doing.

(2) On a petition for divorce presented by the wife the court may, if it thinks fit, direct that the person with whom the husband is alleged to have committed adultery be made a respondent.

178. (1) On a petition for divorce it shall be the duty of the court to satisfy itself so far as it reasonably can both as to the facts alleged and also as to whether the petitioner has been accessory to or has connived at or condoned the adultery or not, and also to enquire into any counter-charge which is made against the petitioner.

(2) If on the evidence the court is not satisfied that the alleged adultery has been committed or finds that the petitioner has during the marriage been accessory to or has connived at or condoned the adultery complained of, or that the petition is presented or prosecuted in collusion with either of the respondents, the court shall dismiss the petition.

(3) If the court is satisfied on the evidence that the case for the petition has been proved and does not find that the petitioner has in any manner been accessory to or connived at or condoned the adultery or that the petition is presented or prosecuted in collusion with either of the respondents, the court shall pronounce a decree of divorce:

Provided that the court shall not be bound to pronounce a decree of divorce if it finds that the petitioner has during the marriage been guilty of adultery, or if in the opinion of the court he has been guilty—

- (a) of unreasonable delay in presenting or prosecuting the petition; or
- (b) of cruelty towards the other party to the marriage; or
- (c) of having without reasonable excuse deserted, or of having without reasonable excuse wilfully separated himself or herself from, the other party before the adultery complained of; or
- (d) of such wilful neglect or misconduct as has conduced to the adultery.

179. In any case in which, on the petition of a husband for divorce, the alleged adulterer is made a co-respondent or in which, on the petition of a wife for divorce, the person with whom the husband is alleged to have committed adultery is made a respondent, the court may after the close of the evidence on the part of the petitioner, direct the co-respondent or the respondent, as the case may be, to be dismissed from the proceedings if the court is of opinion that there is not sufficient evidence against him or her.

180. If in any proceedings for divorce the respondent opposes the relief sought, in the case of proceedings instituted by the husband, on the ground of his adultery, cruelty or desertion, or, in the case of proceedings instituted by the wife, on the ground of her adultery, cruelty or desertion, the court may give to the respondent the same relief to which he or she would have been entitled if he or she had presented a petition seeking such relief.

181. In the case of any petition for divorce or for nullity of marriage—

- (1) The court may, if it thinks fit, direct all necessary papers in the matter to be sent to His Majesty's Proctor, who shall under the directions of the Attorney-General instruct counsel to argue before the court any question in relation to the matter which the court deems to be necessary or expedient to have fully argued, and His Majesty's Proctor shall be entitled to charge the costs of the proceedings as part of the expenses of his office;
- (2) Any person may at any time during the progress of the proceedings or before the decree nisi is made absolute give information to His Majesty's Proctor of any matter material to the due decision of the case, and His Majesty's Proctor may thereupon take such steps as the Attorney-General considers necessary or expedient;
- (3) If in consequence of any such information or otherwise His Majesty's Proctor suspects that any parties to the petition are

or have been acting in collusion for the purpose of obtaining a decree contrary to the justice of the case, he may, under the direction of the Attorney-General, after obtaining the leave of the court, intervene and retain counsel and subpoena witnesses to prove the alleged collusion.

182. (1) Where His Majesty's Proctor intervenes or shows cause against a decree nisi in any proceedings for divorce or for nullity of marriage, the court may make such order as to the payment by other parties to the proceedings of the costs incurred by him in so doing or as to the payment by him of any costs incurred by any of the said parties by reason of his so doing, as may seem just.

(2) So far as the reasonable costs incurred by His Majesty's Proctor in so intervening or showing cause are not fully satisfied by any order made under this section for the payment of his costs, he shall be entitled to charge the difference as part of the expenses of his office, and the Treasury may, if they think fit, order that any costs which under any order made by the court under this section His Majesty's Proctor pays to any parties shall be deemed to be part of the expenses of his office.

183. (1) Every decree for a divorce or for nullity of marriage shall, in the first instance, be a decree nisi not to be made absolute until after the expiration of six months from the pronouncing thereof, unless the court by general or special order from time to time fixes a shorter time.

(2) After the pronouncing of the decree nisi and before the decree is made absolute, any person may, in the prescribed manner, show cause why the decree should not be made absolute by reason of the decree having been obtained by collusion or by reason of material facts not having been brought before the court, and in any such case the court may make the decree absolute, reverse the decree nisi, require further enquiry or otherwise deal with the case as the court thinks fit.

184. (1) As soon as any decree for divorce is made absolute, either of the parties to the marriage may, if there is no right of appeal against the decree absolute, marry again as if the prior marriage had been dissolved by death or, if there is such a right of appeal, may so marry again, if no appeal is presented against the decree, as soon as the time for appealing has expired, or, if an appeal is so presented, as soon as the appeal has been dismissed:

Provided that it shall not be lawful for a man to marry the sister or half-sister of his divorced wife or of his wife by whom he has been divorced during the lifetime of the wife, or the divorced wife of his brother or half-brother or the wife of his brother or half-brother who has divorced his brother during the lifetime of the brother or half-brother.

(2) No clergyman of the Church of England shall be compelled to solemnize the marriage of any person whose former marriage has been dissolved on the ground of his or her adultery, or shall be liable to any proceedings, penalty or censure for solemnizing or refusing to solemnize the marriage of any such person.

(3) If any minister of any church or chapel of the Church of England refuses to perform the marriage service between any persons who but for his refusal would be entitled to have the service performed in that church or chapel, he shall permit any other minister of the Church of England entitled to officiate within the diocese in which the church or chapel is situate to perform the marriage service in that church or chapel.

*Judicial Separation and Restitution of Conjugal Rights*

185. (1) A petition for judicial separation may be presented to the court either by the husband or the wife on the ground of adultery or cruelty, desertion without cause for not less than two years, failure to comply with a decree for restitution of conjugal rights, or on any ground on which a decree for divorce a mensa et thoro might have been pronounced immediately before the commencement of the Matrimonial Causes Act, 1857.

(2) The court may, on being satisfied that the allegations contained in the petition are true and that there is no legal ground why the petition should not be granted, make a decree for judicial separation, and any such decree shall have the same force and effect as a decree for divorce a mensa et thoro had immediately before the commencement of the Matrimonial Causes Act, 1857.

(3) The court may, on the application by petition of the husband or wife against whom a decree for judicial separation has been made, and on being satisfied that the allegations contained in the petition are true, reverse the decree at any time after the making thereof, on the ground that it was obtained in the absence of the person making the application, or, if desertion was the ground of the decree, that there was reasonable cause for the alleged desertion.

(4) The reversal of a decree for judicial separation shall not affect the rights or remedies which any other person would have had if the decree had not been reversed in respect of any debts, contracts or acts of the wife incurred, entered into or done between the date of the decree and of the reversal thereof.

186. A petition for restitution of conjugal rights may be presented to the court either by the husband or the wife, and the court, on being satisfied that the allegations contained in the petition are true, and that there is no legal ground why a decree for restitution of conjugal rights should not be granted, may make the decree accordingly.

187. (1) A decree for restitution of conjugal rights shall not be enforced by attachment, but where the application is by the wife the court, at the time of making the decree or at any time afterwards, may, in the event of the decree not being complied with within any time in that behalf limited by the court, order the respondent to make to the petitioner such periodical payments as may be just, and the order may be enforced in the same manner as an order for alimony in proceedings for judicial separation.

(2) The court may, if it thinks fit, order that the husband shall, to the satisfaction of the court, secure to the wife the periodical payments, and for that purpose may direct that it shall be referred to one of the conveyancing counsel of the court to settle and approve a proper deed or instrument to be executed by all necessary parties.

## APPENDIX II

### GROUND OF DIVORCE IN OTHER COUNTRIES

#### I. THE BRITISH EMPIRE

##### *Australia.*

Throughout the Commonwealth the English grounds apply, with the addition of wilful desertion, except in Tasmania (where wilful desertion is a ground for Judicial Separation only) and with other additions varying in different States. In Victoria (where the requisite domicile is two years) and New South Wales (where the requisite domicile is three years), the period of desertion is three years; in Queensland, West and South Australia, it is five years. South Australia has enacted as recently as 1928 in its Matrimonial Causes Act, No. 1889, the following grounds in addition to adultery: (1) Wilful desertion for five years; (2) habitual drunkenness for three years; if of the husband, coupled with cruelty or neglect to maintain; if of the wife, coupled with neglect of and unfitness for domestic duties; (3) imprisonment for three years whether a commuted capital sentence or a sentence of at least seven years; in the case of a husband only, frequent convictions of crime amounting to at least three years' consequent imprisonment and failure to maintain his wife; (4) conviction for attempt to murder or for assault on petitioner; (5) five years' confinement as a lunatic with improbability of recovery.

##### *Canada.*

Here divorce is under the control of the Dominion Parliament, which has not legislated. The following four provinces, viz., British Columbia, New Brunswick, Nova Scotia and Prince Edward Island have inherited the English Law of Divorce from the time before the Federation Act of 1867. But in Alberta, Manitoba, Ontario and Saskatchewan, divorce is obtainable only by special legislation. Presumably in Quebec, where the old *coutume de Paris* holds, a Parliamentary Divorce is possible in addition to annulment, which, of course, applies in all the Dominions.

In Newfoundland, which has Dominion status, there is no divorce *a vinculo*.

##### *Ceylon.*

Under the Roman-Dutch Law, which obtains in Ceylon, the grounds for complete divorce are (1) adultery, (2) husband's unnatural offences, (3) malicious desertion, (4) imprisonment for life. But there is no divorce *a vinculo* for European residents whose marriage and domicile are in England.<sup>1</sup>

<sup>1</sup> *Le Mesurier v. Le Mesurier*, [1895] A.C. 517

*Ireland.*

Both the Irish Free State and Northern Ireland have been free to legislate for Matrimonial Causes since 1922; but in neither State can the Courts give divorce *a vinculo*. A complete divorce requires an Act of Parliament, as in England before the Act of 1857, and this is confined to Northern Ireland.

*New Zealand.*

Under the Divorce and Matrimonial Causes Act of 1928, No. 16, the grounds of divorce are (1) adultery, (2) wilful desertion for three years, (3) separation by mutual consent for three years, (4) habitual drunkenness coupled with cruelty or neglect of duties, (5) incurable insanity for seven years. Judicial Separation and provision for wives follow the English Law. It is to be noted that New Zealand early allowed marriage with a deceased wife's sister and a deceased brother's widow, and in 1908 provided for the retrospective validity of marriage with a deceased wife's niece and a deceased husband's nephew, but not for future similar breaches of the law of affinity.

*Scotland.*

The grounds are (1) adultery, and (2) wilful desertion for four years (since 1573). Here the defences vary slightly from those in English Law: they are connivance, condonation, conduct conducing. Collusion will be considered by the Court on the evidence of the Lord Advocate, as in England on that of the King's Proctor. The petitioner's adultery is a good answer to a petition on the ground of wilful desertion for four years.

*South Africa.*

The Roman-Dutch Law, already recorded under Ceylon, applies generally with variations in different provinces.

In Southern Rhodesia the Roman-Dutch Law of the Cape Provinces applies; since 1928 community of property between married persons depends on a formal mutual agreement.

In Northern Rhodesia the English Law is enforced, including (since 1924) the provisions of the Matrimonial Causes Act of 1923, and (since 1926) the Deceased Brother's Widow Act of 1921.

## 2. FOREIGN COUNTRIES

*Austria and Hungary.*

The relief in these countries is virtually identical, and divorce *a vinculo* is obtainable on the following grounds: (1) adultery or bigamy, (2) grave crime for which a sentence of five years' imprisonment could be given, (3) malicious desertion, (4) cruelty or conduct endangering life or health, (5) invincible aversion or mutual consent. Judicial Separation can be given on the same grounds.



*Belgium.*

The grounds are (1) adultery of the wife, (2) adultery of the husband if he has brought a concubine into the home, (3) cruelty or equivalent conduct, (4) conviction of serious crime, (5) mutual consent subject to the approval of the Court. After dissolution, ten months must elapse before re-marriage.

*Czecho-Slovakia.*

The grounds are (1) adultery, (2) sentence for grave crime, (3) malicious desertion, (4) attempt on life or health of a spouse, (5) cruelty, (6) disorderly or immoral life, (7) three years' insanity, (8) habitual drunkenness, (9) conduct destroying married happiness, (10) invincible aversion, or mutual consent after Judicial Separation.

*Finland.*

The grounds are (1) adultery, (2) certain diseases, (3) ill-treatment, (4) desertion, (5) habitual drunkenness, (6) imprisonment, (7) insanity.

*France.*

The grounds, subject to certain domiciliary conditions of jurisdiction, are (1) adultery, (2) violence (*exces*) or cruelty (*sérvices*), (3) serious injuries (*injures graves*), e.g. injuries to reputation, habitual drunkenness, refusal of marital rights, (4) imprisonment and the accompaniments implied in *peine afflictive et infamante*, (5) application of either party to the Court after three years' separation (*séparation de corps*). Remarriage is permissible, with a certain restriction of time on the re-marriage of the wife.

*Germany.*

The grounds are (1) adultery, (2) the attempt of one spouse to kill the other, (3) one year's desertion, (4) bigamy, incest and certain gross sexual crimes, (5) three years' insanity, (6) dishonest or immoral conduct. In Germany, unlike England, a divorced wife may be forbidden by the husband to continue to use his name.

*Greece.*

The grounds are (1) adultery, (2) bigamy, (3) danger to life, (4) insanity, (5) desertion.

*Holland.*

The grounds are (1) adultery, (2) wilful desertion for five years, (3) unnatural offences, (4) imprisonment for life, (5) absence for ten years.

*Italy and Spain.*

In these Catholick countries hitherto there has been no divorce *a vinculo*, although annulment on Canon Law grounds gives an equivalent result. 'Divorce' *a mensa et thoro* (permanent separation) is obtainable

on the ground of a wife's adultery, and by the wife if the husband keeps a concubine in such wise as to cause her grave indignity, or if he deserts the wife, fails to maintain her, is guilty of violence, threats or cruelty, or is sentenced for grave crime. N.B.—Reports indicate that the Revolution is changing the conditions in Spain.

*Japan.*

The grounds are (1) wife's adultery, (2) husband's cruelty or desertion or sentence for grave crime, (3) three years' unexplained absence, (4) mutual consent on notice to the Registrar.

*Yugo-Slavia (Serbia).*

The grounds are (1) adultery, (2) attempt on the life of either spouse, (3) sentence for grave crime, (4) abjuration of Christian faith, (5) wilful desertion or absence for six years. These grounds do not apply to Roman Catholic subjects.

*Latvia.*

The grounds are (1) adultery, (2) cruelty, (3) desertion, (4) insanity, (5) dishonest or immoral life, (6) infertility or refusal of marital rights, (7) mutual consent.

*Poland.*

The grounds are (1) adultery, (2) malicious desertion, (3) five years' unexplained absence, (4) impotence, (5) incurable contagious disease, (6) insanity, (7) debauchery, (8) violence and cruelty, (9) misconduct affecting honour or livelihood, (10) sentence for grave crime.

*Portugal.*

In this Roman Catholic country a liberal Divorce Law was introduced by the Republic. The grounds are (1) adultery, (2) penal servitude, (3) cruelty, (4) desertion after three years, (5) three years' incurable insanity, (6) incorrigible gambling habits, (7) incurable contagious disease, (8) mutual consent.

*Russia.*

Under the Soviet Code of 1927 the grounds are (1) mutual consent, (2) the application of either spouse, without notice to the other; divorce on either ground being obtainable by Registration.

Under the Law of 1918 divorce by mutual consent was obtainable by Registration; otherwise on the application of either spouse with the approval of the Court, after summons to the other party and opportunity to appeal.

It is notable that the system of 1918 has been held by the Court of Appeal in this country not to invalidate Russian marriages when the parties are in England.<sup>1</sup> But it remains to be seen whether or not marriages under the 1927 Code will be held to be valid in English Law.

<sup>1</sup> *Nachimson v. Nachimson*, [1930] p. 246, C.A.

Under the old Imperial *régime* the grounds were (1) adultery, (2) bigamy, (3) impotence at the time of marriage, (4) absence without news for five years, (5) exile to Siberia and loss of Civil Rights.

*Scandinavia (including Denmark).*

The grounds are almost identical in Norway, Sweden and Denmark. These are (1) adultery or bigamy, (2) six years' unexplained absence or malicious desertion, (3) three years' insanity, (4) attempt on the life of the other spouse, (5) judicial separation on the ground of incompatibility after one year if no intermediate cohabitation. In Norway there is a further ground of mutual consent after three years' separation.

*South American Republics.*

The Roman Catholick Canon Law largely survives as in European Roman Catholick countries, e.g., in Argentina, Bolivia and Chili; but in Nicaragua and Uruguay divorce *a vinculo* is obtainable on several grounds: (1) adultery, (2) cruelty, (3) husband's attempt to prostitute wife, (4) imprisonment for ten years, (5) desertion, (6) mutual consent.

*Switzerland.*

The grounds are (1) adultery, (2) cruelty or dishonourable treatment, (3) wilful desertion for three years, (4) insanity for three years, (5) incompatibility after two years' separation, (6) mutual consent if the Court agrees.

*Turkey.*

The grounds are (1) adultery, (2) ill-treatment, (3) desertion, (4) offence or conduct detrimental to reputation, (5) mental disease, (6) incompatibility.

*United States of America.*

The grounds for divorce vary in different States, and there are about fifty jurisdictions. It is therefore impossible to give a catalogue which is both clear and brief. There is only one State, viz., South Carolina, in which there is no divorce *a vinculo*. Otherwise the grounds vary between those in New York, viz., (1) adultery, by either spouse, and (2) absence for five years without knowledge, and those in Massachusetts, where the grounds are (1) adultery, (2) impotence, (3) cruelty, (4) three years' desertion, (5) habitual drunkenness or drug-taking, (6) wilful neglect by husband to provide suitable maintenance for wife, (7) conversion to a religious sect which repudiates the marriage tie, coupled with refusal of cohabitation, (8) sentence of hard labour for five years or more. The following points may be noted: In New York, where the defences are similar to those under the English Law, three months must elapse between the decrees *nisi* and absolute; here also cruelty and desertion are grounds for judicial separation. In Kentucky and some other States the first decree is absolute; elsewhere the first decree is *nisi*. In Alabama

sixty days must elapse after the decree before re-marriage becomes legal. In California and Illinois the period from decree *nisi* to decree absolute is one year.

The following points of interest are derived from the article 'Divorce,' by Dr. W. F. Willcox, in the *Encyclopædia Britannica* (14th edition).<sup>1</sup> It may be stated briefly that in six out of every seven States the grounds are desertion, adultery or cruelty. In the majority of States other grounds are imprisonment and habitual drunkenness. In rather less than half the States a further ground is neglect to provide maintenance. It is estimated that these six grounds account for 96 per cent. of American divorces. The returns of 179,397 divorces in 1926 show the following proportions for the first three grounds, viz., 39 per cent. for cruelty, 32 per cent. for desertion, and 9 per cent. for adultery; and it is probable that a further 7 per cent. would be accounted for by some combination of these three grounds. The evidence would seem to show the justification of the grounds of desertion and cruelty in addition to adultery; but, in fact, the ground employed is frequently not the index of the true reason for the divorce. When the grounds of incompatibility and mutual consent are not provided, the aim of reformers to ensure that divorce shall be obtained on the true ground is liable to defeat.

<sup>1</sup> Vol. VII, p. 459.

## APPENDIX III

### NOTE ON PREHISTORIC MARRIAGE

The question of the priority of Marriage or of the Family, which was mentioned in Book I, Chapter I, but left unexamined as having no direct relevance to the legal development of marriage, demands some attention as an accessory to our subject. The use of the word 'priority' needs elucidation at the outset, in the same way in which the words 'primary' and 'secondary' require indication of the senses in which they are used. The first sense of priority is that of being earlier in time; the second is that in which the difference in time is not the principal factor, and the word indicates a difference in order, which may apply at all times. There is a further sense of difference in importance. So also 'primary' and 'secondary' may be used in the sense of time, order (possibly derivative) and importance. In discussing early marriage there must be a sense in which we use the words in reference to time. Did marriage come first, and the family follow? Or was the family the first institution, and did marriage develop therefrom?

Yet these questions may seem to 'beg the question,' because they import into the enquiry the modern conception of monogamous marriage and the legitimate family; for the majority of people necessarily think of marriage and the family in the current and familiar sense. The truer index to the sense of the term 'priority' might seem to be provided by the word 'dependent.' For, although it is obvious that there must be a sexual union which precedes in time the birth of children, and the marriage might thus seem to claim priority over the family, the ideas in reality are not so simple; and the question is rather which institution is dependent on the other. The priority (in time) of the motive in primitive man will be an indication of the dominant instinct of the natural man. That instinct probably remains, even when civilization has limited his freedom and circumscribed his natural proclivities by the laws and customs of institutional life.

The early and apparently low status of women has commonly suggested that the primitive marriage was the result of man's urge to mate in animal fashion for the procreation of children, and that the exaltation of the secondary (psychical or spiritual) factor over the primary (physical or reproductive) is the work of civilization. Granted that this impression of the inferior status of women may be in some measure true of primitive marriage, it does not answer the question of priority when that concerns the habits of primitive people before marriage, in any accepted definition, was known. The contention, which is not now new, that when primitive man lived in hordes, procreation was promiscuous, and monogamy therefore a later development, invited the answer which is crystallized into the familiar statement of Westermarck's that 'marriage is rooted in the family rather than the family in marriage.' This view will harmonize

with the legal proposition of Rosenthal's, that the conception of legal marriage is inseparable from the intention of procreation. In other words, marriage depends upon potential parenthood; and, although sexual companionship can produce a family, it is the family in familial conditions, not the union of parents for their own benefit, which is the pivot of the institution. This argument would point to originally monogamous marriage in principle, because, although the identity of a family with the parents would be possible in limited conditions of polyandry and polygyny, it would be impossible to identify the source of the children in the promiscuous life of a horde or tribe.

Westermarck's view is held by a number of authorities, notably Malinowsky, but is questioned by an equal, and growing, number since the time of Lewis Henry Morgan (*ob.* 1881), whose work was largely responsible for Westermarck's rejoinder. This view will no doubt be accepted as true in appearance and effect through a great part of the history of marriage, but it has to meet with increasing opposition as a correct statement of the prehistoric origin of marriage, and therefore of the natural tendency of the human race when relieved of the restraints of civilization.

While marriage is regarded historically and not pre-historically, the view of Dr. Havelock Ellis will hold, viz., that 'the primary end of marriage is to beget and bear offspring' (primary in time and primary in the conception of its importance at that time); for he goes on to point out that for a large part of the world's life this remained the sole end of marriage, as to a great extent it remains among primitive people still; but that other not less worthy and in some sense more spiritual ends of marriage have emerged with more modern understanding. (*Little Essays of Love and Virtue*, pp. 63 ff.) If now the secondary factors are as important as the primary, they must always have been so in fact, although they were not realized through a great part of the history of marriage. In evidence, however, that the secondary factors probably played some part in primitive times, it is advanced that the association of certain animals (who are assumed to serve as an indication of the habits of primitive man) is not obviously aimed at the procreation of offspring, but is dictated as much by 'the urge of the gregarious instinct,' or the desire for companionship. (*Vide* Ralph de Pomerai, *Marriage: Past, Present and Future*, p. viii.) In favour of this contention in a limited measure it may be admitted that there have been primitive peoples, of whom specimens survive to this day, who have entered into sexual relationships without connecting their practice with the idea of procreation at all. When children have been born, actually as the result of intercourse, these people have attributed them to other agencies. This phenomenon (noticed by Dr Douglas White in his *Principles of Sexual Conduct*, p. 14) does not of course establish the complete matrimonial companionship which is so important a factor in the modern conception of marriage, but it shows that even in primitive conditions sex has been valued for its own sake, and not necessarily as an incident in the production of families.

Our use of the terms 'primitive,' 'family,' and 'marriage' must all be

qualified by the times to which they refer. The 'family' and 'marriage' imply that these institutions had come into existence, and the word 'primitive' in relation to marriage commonly refers to primitive civilizations. The true solution must be held to lie further back in the remote periods of pre-history when the conditions, although matter of speculation, can be estimated in the evolutionary scale with some assurance. The anthropoid apes, from whose habits of solitariness some have sought to deduce that monogamy is natural to mankind, are not the ancestors of man, but his collaterals. The common stock, from which both appear to trace their descent, is represented by the lower monkey tribes, which exhibit a large promiscuity. Before families, marriage, or even primitive civilizations were known, our human ancestors lived in hordes. Sexual promiscuity expressed itself in polygyny and polyandry, both collectively known as polygamy. A form of 'marriage' enjoying no permanence and every-wise variable thus appears to have existed before the primitive horde passed into the constituent units of the early familial phase. This 'marriage,' in so far as it can be so called, was polygamous. It may indeed be said that man is naturally polygamous, and the task of civilization has been to curb his roving instincts through the influence of the higher culture. But observers of the historical development of sexual and matrimonial life are found variously to describe both polygamy and monogamy as 'natural,' and it might seem that the two descriptions can hardly both be true. Yet this issue may resolve itself into no more than this: that man has natural polygamous propensities, and the human race has always shown a tendency to varietism; but the quality of affection which alone (apart from communal coercion of whatever form, e.g. the civil law) preserves monogamy, is also natural, even if it be an expression of nature in more advanced development. Thus perhaps it may be maintained that monogamy is natural, even if it be a 'second nature.'

The promiscuous life of the polyandrous and polygynous horde could not properly be termed marriage at all; and where primitive man's first 'marriages' show the smallest sign of monogamous form, they appear to have been made not through sexual or psychic emotions but under economic necessity. These first 'wives' were properties, acquisitions, chattels, slaves. They lent a monogamous colour to the domestic life only in the sense that apparently they served their masters one at a time, although they suffered frequent exchange by their owners with the women of other owners. But such women did not in any wise curtail the polygamous habits which the natural need for variety on the part of their owners promoted. There was no individual or recognized parenthood within the horde, for the horde was organized not in families, but by seniority. 'The system of Age groups,' writes Dr. Muller-Lyer, 'must therefore be considered as a highly valuable documentary and historic survival from a far off alien world, in which the horde was All and the individual Nothing; in which all labours, all dangers, all goods and gear, and even probably all the women of the tribe were regarded and possessed in common.' (*The Family*, p. 53. Chapter II of this book

(pp. 29-78) sets out arguments for and against early polygamy and monogamy with extensive reference to authorities.)

Here, perhaps, it could hardly be argued either that 'marriage is rooted in the family' or 'the family in marriage,' for neither of these institutions could properly be said to exist. The only kind of union which could pass for marriage had its root in economic need, not in sexual attraction or biological purpose. The family appears to own no precise historic root, but exists only in the promiscuous procreation of children in the life of the horde; and if it should be said that what is called 'the primary purpose of marriage' was realized in some remote sense in this communal life, then the orthodox view that 'marriage is rooted in the family' can be substantiated in pre-history in these senses (which amount to truism), that the procreation of children by the horde, which was one vast family classified according to age, necessitated sexual union and preceded the late development of marriage when the horde was re-classified according to sex associations. After this stage and in a process of gradual growth the more organized society known in civilized ages as the State generally frowned upon polygamy and established monogamous marriage. But this fact of history does not exclude the deduction from prehistoric conditions and from the evolutionary experience of the race that man is naturally polygamous, that he is naturally directed more by the sexual instinct than by the desire for progeny, and that therefore the family is rooted in marriage.

This controversy between the priority of marriage or of the family might well seem to be artificial, since marriage and the family in modern life are seen commonly to go together. The same might be said of the interesting question of the priority of the patriarchate or of the matriarchate, because the patriarchate is the more commonly accepted practice. While there is evidence of a matriarchate in the age of Agriculture or Later Barbarism before the development of the early city, it cannot have arisen at least after the practice of exogamy had enlarged the self-contained life of the horde and begun to substitute the longitudinal divisions of the family for the latitudinal divisions of age. This is but to indicate the earliest age of the matriarchate; it does not rule out a previous patriarchate. Either, of course, would imply something in the nature of the institution of the family, but neither indicates original conditions. If we admit the principle that the primary end of the association, which through an evolutionary process grew into marriage, is to beget and bear offspring, it would follow that the family is in some measure necessary to marriage, and that marriage would be incomplete without the family; and so indeed for vast ages of man's history it has been. It is only occasional glimpses of high civilizations which have exhibited another aspect. The contention of those who now maintain that the family is rooted in marriage would seem to amount to this, viz., that the affection which preserves monogamous marriage is the condition of all true marriage; that, affectionate companionship being the condition of marriage, the procreation of children may or may not follow; that, in a word, the family is not necessary to marriage. The secondary or psychic



factor has indeed overtaken the primary or productive factor in importance; but this emergence of the secondary factor is a mark of feminine emancipation, and is modern. This, again, is to use a relative term to indicate the ages of man's development in contrast with his remote pre-history. But in the pre-Christian centuries some countries were advanced in some of the essentials of civilized life, and they go to show that although the biological statement that 'marriage is rooted in the family' has been true in appearance through the great reaches of history, this phenomenon has not excluded the element of companionship which marks the stages of modern development and the emancipation of women. Incidentally, it is true that this 'modern' development militates against large families, and promotes 'divorce law reform.' The alleged biological fact of the priority (in importance) of the family may be accepted in the sense that in the natural course the family is the inevitable accompaniment of the sexual union, and that marriage serves the offspring of the union; but for a long period of prehistoric human life promiscuity gave an early priority of importance to sexual relations, and to-day civilization excludes the biological consequences of marriage in the interests of its more spiritual purposes.

From the remote phases of prehistoric sexual development to the great civilizations of antiquity a vast stride has to be taken, and this leads us into a stage of development which we must perforce describe as relatively modern. For the evidence shows the emergence of social systems marked by a 'modern' emancipation of woman, only to be succeeded by apparent reaction until the rise and development of the next great power holds the attention of the historian. This is illustrated in the ancient succession of Babylon, Egypt, Greece, Rome, and more lately in the Mediæval Church, the countries of Western Europe in the modern epoch, and the current revolt against narrow traditional conceptions of marriage and sex.

## APPENDIX IV

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# INDEX

- Abrahams, Dr. Israel, on Hillel and Shammai, 68 *n*.
- Acton, Lord, 98, 100.
- Adler, Dr. H., on Hillel and Shammai, 68 *n*.
- Adultery—  
as ground of Separation (*see also* Canon Law), 124, 156  
as statutory ground of Dissolution, 126, 155, 321, 327 and *passim*
- Aethelbert, Dooms of, 94 *n*.
- Alexander III (Pope), 83.
- Alimony, 140, 372.
- America, Divorce in, 10, 265, 356-8, 410-11
- Analogy between Marriage and the Relationships of Natural Family, *excursus* on, 213-16
- Anne Boleyn (Queen), 104 *ff*.
- Anne of Cleves (Queen), 109.
- Annulment—  
Bars to, 162-8.  
distinguished from Divorce, 9, 31, 104 *ff*.  
Relief by, under present law, 124, 153-4  
Proposed grounds of, 317-20, 364  
*See also* Canon Law, Domicil, Henry VIII  
Marriage (void, voidable and valid)
- Antoninus Pius (Emperor), 44
- Apollodorus, 37 *n*
- Appeals, 142
- Assize, Judges of, in Matrimonial Causes, 124, 147, 272, 369
- Austin, John, on Interpretation of Statutes, 242 *ff*.
- Bateson, Mr. Justice, 290 *ff*.
- Bayford, Mr. R. F., K.C., Preface
- Bentham, Jeremy—  
on Mutual Consent, 380  
on Separation, 223
- Bezzant, Rev. J. S., Preface  
on the Authority of the Founder of Christianity, 67
- Bigamy—  
ground of Annulment, 83, 184, 292
- Bigamy—*continued*.  
ground of Dissolution, coupled with adultery, 126-7, 155, 326  
Papal Dispensation for, 105  
rejected as a sole ground of Dissolution, 326  
Statute of, 114
- Birkenhead, Lord, as a Divorce Law Reformer, 211, 261, 278, 322, 325
- Birth Control, 333 *ff*.  
Methods of, 337  
Progress of, 338 *ff*.  
Views of bishops on, 336
- Bishop, Mr. J. P., on Permanent Separation, 281
- Boniface VIII (Pope), 81
- Box, Dr. G. H., Divorce in the New Testament, 53, 65
- Bryce, Lord, on Roman and Canon Law, etc., 35, 41, 42, 75, 350
- Buckland, Dr. W. W. (Regius Professor of Civil Law, Cambridge), 42
- Buckmaster, Lord, as Divorce Law Reformer, 27, 28, 264-5
- Burkitt, Dr. F. C., 53
- Burnet, Gilbert (Bishop), History of Reformation, 112 *n*.
- Calvin, John, Reformed Practice at Geneva, 98
- Campeggio (Cardinal), 105
- Canon Law, The, 75 *ff*. and *passim*  
Annulment under, 81-4, 255-6, 287-9  
Beginning of, 78  
Definition of, 75-6  
Effect of, 75, 353  
Encroachments of, 79  
Requisites of Marriage under, 81 *ff*.  
Under survival of, 7, 31, 94-5, 104, 138, 171, 178, 203, 219, 269, 281-2, 330, 343, 353
- Canterbury, Archbishop of (Lord Davidson), 203, 211, 254  
(Dr. Lang), 257, 266, 325 *n*.  
*See also* York
- Catherine of Aragon (Queen), 104 *ff*.
- Catherine Howard (Queen), 109

- Catherine Parr (Queen), 110  
 Celibacy of Clergy, 87-8  
 Charles, Dr. R. H., on Divorce in the  
     New Testament, 52, 62, 64 ff.  
 Chelmsford, Lord, 173  
 Children, Custody of, 136, 374  
 Civilians and Canonists, 102 n.  
 Clement V (Pope), 81  
 Clement VII (Pope), 104 ff.  
 Codex, 70 ff.  
 Coemptio, 40 ff.  
 Collusion, 131, 171, 174-5, 211-13,  
     218-24, 227, 354-5, 384-5, 390-1  
 Condonation, 131, 171, 175-7, 219 ff.,  
     227, 229 ff., 384-5  
 Confarreatio, 40 ff.  
 Conflict of Laws, *see* Domicil  
 Conjugal Duties, Refusal to perform,  
     328, 367  
 Connivance, 131, 171-4, 219 ff., 227,  
     232, 384-5  
 Constantine (Emperor), 70  
 Conubium, 40  
*Corpus Juris Canonici*, 80, 94, 99  
*Corpus Juris Civilis*, 80, 94, 99  
 Costs, 141, 378  
 Cotton, Lord Justice, 142  
 Courts, Evolution of, 122-3  
 Covenant not to Sue, compared with  
     Condonation and Connivance,  
     161, 175-6  
 Cozens-Hardy, Lord, M.R., 298  
 Cranworth, Lord, 170  
 Cresswell, Sir Cresswell, 173-4  
 Cromwell, Thomas, 109  
 Cruelty—  
     as ground of Dissolution, coupled  
         with Adultery, 126, 129, 155  
     as ground of Separation, 124, 156  
     as proposed ground of Dissolution,  
         212, 321-2, 367  
     'Constructive,' 127, 156 n.  
 Damages, 133-5, 379  
 Decrees, 143  
 Decretum of Gratian, 80 ff.  
     Text of, on Constituents of marriage,  
         82  
     Text of, on Indissolubility, 85  
*De Institutione Virginis* (St. Ambrose),  
     82  
 De Montmorency, Mr. J. E. G., 68 n.  
 De Pomerai, Mr. Ralph, 62, 369, 413  
 Desertion—  
     as ground of Dissolution, coupled  
         with adultery, 126, 129, 155  
     as ground of Separation (1924), 156  
     as proposed ground of Dissolution,  
         321, 367  
 Dicey, Professor, on Conflict of Laws,  
     297, 304  
 Dibdin, Sir Lewis, on *Reformatio*  
     *Legum*, 112 n.  
*Diffarreatio*, 43  
*Digest*, 80 ff.  
 Dionysius Exiguus, 78, 93  
 Discretion—  
     Discretionary Bars, 8, 177-90,  
         219, 221, 222, 384 ff.  
     Misinterpretation of, 8, 190, 238-  
         50, 386  
 Disease—  
     as a ground of Annulment, 318  
     as a ground of Dissolution, 327  
 Divorce (Dissolution)—  
     Abroad, 406 ff.  
     America, 10, 265, 356-8, 410-11  
     among the Jews, 48 ff.  
     curtailed by Christian Emperors,  
         71 ff.  
     disallowed under Canon Law, 85 ff.  
     Ecclesiastical attitude to, recent  
         examples of, 252 ff., 343  
     in Christian teaching, 47, 49-68  
     in England (Anglo-Saxon), 93, 94  
     By Private Act of Parliament,  
         112 ff.  
     Case of Duke of Norfolk, 118  
     Case of Marquis of Northamp-  
         ton, 112  
     Case of Lord Roos, 115  
     Dillon's Case (1701), 116 n.  
     By Statute, 126 ff., 401 ff. and  
         *passim*  
     Bars to Dissolution, 169-95  
     Failure of Present Law, 29 ff.,  
         201 ff.  
     Increase in cases, 28, 355  
     *See also* Collusion, Connivance,  
         Condonation, Discretion.  
 Mutual Consent, 376-7  
     In lieu of Separation, 393 ff.  
 Objections, 379-83  
 Safeguards, Period of Pro-  
     bation, 369 ff.  
 Safeguards, Various, 388 ff.

- Divorce (Dissolution) in England—  
*continued*  
 New Grounds Proposed—  
   Defended Suits, 369  
   Incompatibility, 367  
   Undefended Suits, 376  
   Russia, 311-15, 360 *n.*, 409-10  
   Scotland, 99, 100, 275 *n.*, 358, 407  
   under Roman Civil Law, 43  
*Divortium Communi Consensu*, 8, 43,  
 312, 367  
 Domicil—  
   Dissolution Suits, 169-71, 306-15,  
   365  
   Nullity Suits, 162-8, 284 *ff.*, 363  
   of Wife after Annulment of  
   Marriage, 304-6  
 Doctors' Commons, 95, 144  
 Drunkenness, as proposed ground of  
   Dissolution, 321, 324, 367  
 Dunedin, Lord—  
   Jurisdiction, Domicil, nature of  
   *res*, 290-1, 294
- Edward VI, 111  
 Elizabeth (Queen), 107, 108, 113  
 Erasmus, 88  
 Esmein, 83  
 Exeter, Bishop of (Dr. Henry Phil-  
   potts), condemns Separations,  
 269  
 Extravagants of Popes, 81
- Fletcher Moulton, Lord Justice, 158,  
 161, 193  
 Fornication, 47, 57, 61 *ff.*, 85
- Gaius, *Institutes*, 39 *ff.*  
 Gaskoin, Mr. C. J. B., Preface  
 Gates, Mr. Richard T., 274  
 Geikie-Cobb, Dr. W. F., Preface  
 Geldart, Professor, Collusion, 223  
   Judge-made Law, 250  
 Gibbon, Edward, 45, 61, 74, 86  
 Gladstone, Right Hon. W. E.,  
   attitude to Reform, 121  
 Glover, Dr. T. R., 37 *n.*  
 Goodhart, Dr. A. L. (Professor of  
   Jurisprudence, Oxford), 250 *n.*  
 Gore, Dr. (Bishop of Birmingham,  
   afterwards of Oxford), on Indis-  
   solubility,
- Gorell, Lord (formerly Gorell Barnes,  
 P.) on the Need of Reform, 26,  
 224, 270, 321, 380
- Gospels—  
   Dominical Legislation, question of,  
   45 *f.*, 59, 60  
   Fornication, meaning of, 61-2  
   Herodias, discussion of case of, 53-5  
   Mark, Influence of Roman Law on, 52  
   Matthew and Mark, differences,  
   56-9  
   relative to Marriage and Divorce,  
   45 *ff.*  
 Gratian, *Decretum*, 80 *ff.*, 288  
 Gregory IX (Pope), 81  
 Guardianship of Women, 39
- Haddan and Stubbs, *Councils and  
 Ecclesiastical Documents*, 94 *n.*  
 Haire, Dr. Norman, 337, 339  
 Haldane, Lord, on Jurisdiction and  
   Domicil, 294  
 Hallam, Henry, *Constitutional History*,  
 112 *n.*  
 Hannen, Lord (formerly Hannen, P.)  
   quotes *Aeneid*, 228  
   on Wife's Domicil, 297, 300, 305  
 Hardwicke, Lord, L.C., Marriage  
   Act, 84, 117  
   Ellis, Dr., Birth Control,  
   Marriage, etc., 37 *n.*, 178, 209,  
   334-5, 347, 359 *f.*  
   *Mr. E. S. P.*, Preface and  
   228 *n.*  
 Henry III, 94, 102  
 Henry VIII, 84, 102 *ff.*  
   Annates Acts, Statute of Appeals,  
   Submission of Clergy, 107  
   Favours the Civil Law, 110  
   His Annulments of Marriage, 107 *ff.*  
   Legislation against Canon Law, 107,  
   110, 111  
   Legislation against Pre-Contracts,  
   109  
   *Praemunire*, 106  
   Succession of the Crown, 108  
 Hensley Henson, Dr. (Bishop of  
   Durham), 101, 261  
 Herbert, Mr. A. P., 234  
 Hildebrand (Pope Gregory VII), pro-  
   motes clerical celibacy, 88  
 Hill, Mr. Justice, 128, 138, 185, 235-6,



- Hillel, School of, 49 ff., 68 n.  
 Holdsworth, Sir William (*History of English Law*), 80, 81, 250  
 Hooker, Richard (*Ecclesiastical Polity*), 97  
 'Hotel Evidence,' 175, 233-7, 391
- Ignatius, Early Christian Marriage, 77  
*Impedimenta Dirimentia*, 85 and *passim*  
*See also*, Annulment, Canon Law, Domicil.
- Imprisonment, as ground of Dissolution, 324, 375  
 Incapacity, ground of Annulment, 83, 154, 167 ff., 285 ff.  
 'Constructive' Impotence, 319, 320  
 Incompatibility—  
   as ultimate ground of Divorce, 218, 222, 224, 241, 356  
   proposed new ground, 10, 367 ff.
- Inge, Dr. W. R. (Dean of St. Paul's), on Dysgenic Selection, 339
- Innocent II (Pope), 83  
 Insanity—  
   as ground of Annulment, 83, 154, 317, 318  
   as proposed ground of Dissolution, 323, 375
- Institutes*—  
 (Gaius), 39 ff.  
 (Justinian), 70 ff.
- James I, Statute of Bigamy, 114  
 James, Lord Justice, 297 n.  
 John XXII (Pope), 81
- Judge-made Law, validity of the phrase considered, 247, 250
- Julius II (Pope), 104
- Juries, 130-1, 133-5
- Jus Civile*, *See* ch. Roman Civil Law; *also*, 70 ff., 75 ff., 98, 102, 110
- Jus Liberorum*, 38, 39  
*Justae Nuptiae*, 40 ff.
- Justices of the Peace, unsuitability of, in Matrimonial Causes, 147, 272-3
- Justin II (Emperor), 73  
   Divorce by Mutual Consent restored by, 73, 74  
   Second Novel of (Nov. 140), 74 n., 75 n., 93
- Justinian (Emperor), 70  
   *Codex, Digest, Institutes*, 70 ff.  
   grounds of Divorce under, 71 ff.  
   *Novels*, 71, 72
- King's Proctor, 144, 190-1, 371 ff.  
 Kitchen, S. B. (*History of Divorce*), 88 n., 89 n., 204 n., 121 n.
- Lacey, Dr. T. A., on Canon Law, Indissolubility, etc., 76, 89, 91, Reply to, 206, 213 ff.
- Lambeth Conference, 254 ff., 258 ff.
- Latey, Mr. William, Preface and 187
- Law, Importance of study of, 32
- Lawrence, Lord Justice, 139, 236
- Lea, H. C., the Mediaeval Church, 87, 88, 91
- Lecky, W. E. H., 37 n., 88, 347
- Legislation, Recent, in Matrimonial and related causes, 148
- Lenocinium*, 100 n.
- Leo, Emperor (the Wise), 74, 75, 79
- Leo III (the Isaurian), 79
- Lex Domicilii*, 162 ff., 169, 206, 213-16  
   *See also* Domicil
- Lex Loci*, 163 ff., 213-16
- Liverpool, Bishop of, 336
- Lushington, Dr., 119
- Luther, Martin, burns Canon Law, 97
- Lyndhurst, Lord (formerly L.C.), advocates Reform, 120
- McCardie, Mr. Justice, 338 n.
- Macdonell, Sir John, on Mutual Consent, 376 n.
- McNair, Dr. Arnold D., Preface
- Magna Carta*, 94
- Maine, Sir Henry, on Roman Divorce, 42, 353
- Maintenance after Decree, 141, 232, 341, 378
- Maitland, Professor F. W., Civil and Canon Law, 81, 102, 110
- Major, Dr. H. D. A., on the Gospel *dicta*, 52
- Manus*, 36 ff.
- Marcus Aurelius (Emperor), 44
- Marlbrough Case (1926), 255-6 n., 289 n.

Marriage—

- Christian, Definition of, 311
- Christian Ideal of, 62, 63, 66-68
- Clandestine, Prevention of, 100-1, 116-18
- Classic Definition of, 39
- Conjugium (ad) Perfectionem*, 84
- Conjugium Initiatum*, 82 ff., 287
- Conjugium Ratum*, 82 ff., 287
- Conjugium Ratum sed non consummatum*, 84, 87, 105, 288
- Divorce in Anglo-Saxon Law and Custom, 93 ff.
- Indissolubility of, under Canon Law, 85 ff.
- Licences, 123
  - Refusal of Special, 265-7
- Prohibited Degrees, relaxation of, 26, 133, 259-61, 325 n.
- Special Case of Russian, 311-14
- Sponsalia per verba de futuro*, 83, 84, 109, 117
- Sponsalia per verba de praesenti*, 83, 84, 105, 109, 117
- Void, Voidable and Valid, 286 ff.
- Mary Tudor (Queen), 108, 112
- Maule, Mr. Justice, Ironical Judgement on difficulty of Divorce, 118
- Merrivale, Lord, P., 142, 181 ff., 234-6, 239 ff., 313, 325
- Milton, John, on Divorce Reform, 92, 114, 115
- Modestinus, Herennius, Definition of Marriage, 39
- Müller-Lyer, Dr. (*The Family*), 31, 351
- Mutual Consent—
  - Operation in fact, but not in form, 212, 221
  - Petitions by, proposed, 10, 326, 328, 367 ff., 376 f., 379-83
- New grounds of Dissolution, 367 ff.
- Newman Smyth, Dr., on Christian Divorce, 66
- Norfolk, Duke of, re-marriage of, 118, 269 n.
- Northampton, Marquis of, re-marriage of, 112
- Novellae*, 71, 72, 74

*Opus Imperfectum in Matthaeum*, 82  
Origen, 77

- Paley, Dr. William, 113
- Palmerston, Lord (P.M.), on Mr. Gladstone's attitude to Divorce Reform, 121 n.
- Parker (Archbishop), Admonitions, 113, 116
- Paterfamilias*, 40
- Patria Potestas*, 38 ff.
- Penzance, Lord, Judgements and Dicta, 8, 179 ff., 239, 245-6, 311
- Peterborough, Bishop of, on Re-marriage, 257
- Phillimore, Lord, Domicil and Jurisdiction, 293-4
- Phillimore, Sir Robert, 170
- Pollard, Professor A. F., on Henry VIII's nullity as cause of Reformation, 103, 105 n.
- Pollock and Maitland, *History of the English Law*, 91 n., 94 n.
- Poor Persons' Causes, 147
- Pregnancy, undisclosed, as ground of Annulment, 319
- Ratio Decidendi*, in 'Discretion' Cases, 246, 248
- Ratio Legis*, 248
- Raymond of Pennafort, 81
- Reformatio Legum Ecclesiasticarum*, 111, 112, 270, 325, 327, 393
- Refusal of Marital Rights, as ground of Annulment, 319, 320
  - rejected as ground of Dissolution, 328-9
- Relief—
  - Bars to, 131, 160 ff., 217 ff., 238 ff., 384 ff., 390-1
  - by Annulment, 153
  - by Dissolution, 155
  - by Separation, 156
  - by Statute (15 and 16 Geo.V, c. 49), 401 ff.
  - in Various Countries, 406-11
  - New Proposals for—
    - by Annulment, 363 f.
    - by Dissolution, 365 ff.
- Reformation—
  - effects on Marriage Laws, 97 ff.
  - in Germany, 97

- Reformation—*continued*.  
 at Geneva, 98  
 at Leyden, 99  
 in Catholick Countries, 100  
 in England, 101 ff.  
 in England, Causes of, 103  
 in Scotland, 99
- Re-marriage after Divorce—  
 by Licence, frustrated, 266  
 Communion after, 258 ff.  
 in American Church, 265  
 Repudiation by Church, 8, 252 ff.  
 under Statute, 25, 132, 251, 264-5, 391, 392
- Remnant, Mr. Ernest, Preface
- Repudium (libellus repudii)*, 8, 43, 312, 367
- Reynolds, Dr. Ralph A., on Divorce, etc., in Russia, 360 n.
- Roman Wife, Position of, 41, 42, 347-8
- Rome, Ancient—  
 Divorce in, 346 ff.  
 Fall of, Causes of, 349-51
- Rome, Church of—  
 Propriety of Practice of Annulment misjudged by Anglicans, 9, 31, 255-6
- Reactionary Features, 31, 335
- Reform of, 100-1
- See also Canon Law, Effects of the Reformation.
- Romer, Lord Justice, 236
- Roos, Lord, Re-marriage of, 114, 115, 269 n.
- Royal Commission on Divorce and Matrimonial Causes, 26, 45, 55, 68, 112 n., 343-4, 358, 363
- Recommendation of new grounds—  
 Annulment, 317-20  
 Dissolution, 320-25  
 Grounds rejected, 326-30  
 Dissolution in lieu of Separation, 276
- In respect of Domicil, 307-8, 365
- Russell v. Russell* (1924), New Rule in, 177
- Russia, Marriage and Divorce in, 311-15, 360 n., 409-10
- St. Albans, Bishop of, 336
- St. Augustine, 70
- St. Edmundsbury and Ipswich, Bishop of, 58, 60, 258
- St. Helier, Lord (Jeune P.), on 'Discretion,' 180, 245
- St. Jerome, 70, 347
- St. Paul, 64 ff.
- Salisbury, Bishop of, 257 n.
- Salvesen, Lord—  
 on Divorce Reform, 255 n.  
 on Scottish Divorce, 358
- Sanday, Dr. W., on Matthaean Exception, 58
- Schmiedel, Dr. P. W.—  
 on Influence of Roman Law on Mark, 52  
 on Meaning of *πορνεία*, 62
- Scotland, Divorce in, 99, 100, 275 n., 358
- Selden, John, 103, 115
- Separation, *a mensa et thoro*  
 Abolition of, 393 ff.  
 as Bar to Dissolution, 192-5  
 Bars to, 196-7  
 Judicial, 124, 268 ff.  
 Relief by, 156-9  
 See also under Canon Law  
 Sham of, see Chapter heading  
 Stricture on, *per* Lord Birkenhead, 271
- Separation Scandals, 276-82
- Settlement—  
 of Wife's Property, 136  
 Variation of, 137, 378
- Sex, Place of, in Marriage, 331 ff.
- Shammai, School of, 49 ff., 68 n.
- Sixtus V (Pope), 81
- Smith, Preserved, 97 n.
- Stanley, Dr. A. P. (Dean), 92 n.
- Stopes, Dr. Marie, 337
- Stowell, Lord, 119, 281
- Streeter, Dr. B. H., 52 n.
- Strype, J. (*Memorials of Cranmer*), 111 n.
- Stubbs, Dr. W. (Bishop of Oxford),—  
 Civil and Canon Laws, 94, 102  
 Henry VIII, 110
- Summary Jurisdiction, Separation under, 144, 269 ff., 395
- Sumner, Lord, Prophetic Judgement in *Russell v. Russell*, 177
- Symmachus, Letters of, 350
- Theodore, Archbishop of Canterbury, *Penitential*, 94
- Theodosius (Emperor), 71

- Ulpian, on Constitution of Marriage, 69, 81  
 Unconquerable Aversion, 327, 367  
*Usus*, 40 ff.  
 Valentinian (Emperor), 71  
 Van Espen, on requisites of marriage, 84 n.  
 Variation of Settlements, 137-40, 378  
 Venereal Disease—  
   as Constructive Cruelty, 156  
   as ground of Annulment, 318  
 Vesey-Fitzgerald, S. G., *Nachimson's and Hyde's Cases* (in *L.Q.R.*), 311 n.  
*Virgo Intacta*, 128, 271  
 Warrington, Lord Justice, 161  
 Watkins, O. D., 92 n.,  
 Wedlock, New Fashion of, in Rome, 43  
 Wellhausen, 49, 204  
 Westbury, Lord, L.C., 173  
 Westlake, Professor—  
   on Jurisdiction in Suits for Nullity, 297  
 Westlake, Professor—*continued.*  
   on Wife's Domicil, 170 n.  
 Whittingham, Dr. (Bishop of St. Edmundsbury and Ipswich), on Divorce and Re-marriage, 58, 60, 258  
 William III, 116  
 Winchester, Bishop of, 257 n.  
 Wives, Relief for, under Statute, 128, 141  
 Wolsey (Cardinal), 105 f.  
 Woman—  
   Among the Jews, 37, 48-9  
   In Egypt, Babylon, Greece, 37  
   In Modern Times, 141, 333 ff., 341 f., 353, 416  
   Reaction under Christian Fathers and Emperors, 69 ff.  
   Under Roman Civil Law, 38 ff., 347-8, 353  
   Under the Canon Law, 86, 87  
 Yarros, Dr. Rachelle S., on Divorce, etc., in Russia, 360 n.  
 York, Archbishop of (Dr. Lang), now Canterbury, 322, 343-5







